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# COMITY IN US COURTS

Thomas Schultz\* & Niccolò Ridi\*\*

## I. INTRODUCTION

Throughout much of the world, the concept of comity has played a fundamental role in the shaping of modern private international law.<sup>1</sup> Sometimes labelled as a “principle,” sometimes as a “doctrine,” it provided the foundation and informed the evolution of a number of rules of conflict.<sup>2</sup> Granted, in many jurisdictions, comity gradually saw its importance fade as conflict came to be absorbed into the preserve of the domestic legislator.<sup>3</sup> Scholarly attention declined too, prompting private international lawyers to dismiss comity as the flickering shimmer of a time long past, in the name of which courts would sometimes fine-tune the reach of their national substantive law and jurisdictional rules, refrain from questioning the lawfulness of

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<sup>1</sup> Thomas Schultz & David Holloway, *Retour sur la comity, deuxième partie: La comity dans l'histoire du droit international privé*, J. DROIT INT. 571–595, 593–594 (2012).

<sup>2</sup> Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, HARV. LAW REV. 361–394, 363 (1945); Donald Earl III Childress, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 UC DAVIS LAW REV. 11 (2010); William S. Dodge, *International Comity in American Law*, 115 COLUMBIA LAW REV. 2071 (2015).

<sup>3</sup> *Id.* at 593–594.

another sovereign state's acts, and restrict themselves from issuing such judgments and orders when to do so would have amounted to an unjustifiable interference.<sup>4</sup>

But fading and disappearing, to paraphrase Charles I,<sup>5</sup> are clean different things. Comity never really vanished, and has been invoked – as a principle, a doctrine, or unidentified institution – in a great number of cases, prompting scholars to observe that it was perhaps premature to pronounce its demise.<sup>6</sup> Comity, as the English Lord Collins of Mapesbury put it, “may be a discredited concept in the eyes of the text-writers, but it thrives in the judicial decisions.”<sup>7</sup> What is more, there is evidence that comity may have made a quiet comeback: References to the concept have been gradually increasing for some time in the decisions of certain courts, namely those of the United States of America.<sup>8</sup>

To some, this peculiarity will not come as a surprise: Indeed, comity has long been acknowledged as a foundational principle—if not *the* foundation—of American conflict of laws.<sup>9</sup> A foundation whose importance cannot be fully understood without digging deep into a complex narrative, which unfolds in intertwined tales of misunderstandings, ethical battles, and nation-building efforts.<sup>10</sup> Further, while unique historical circumstances offered fertile ground for the concept of comity to adhere and prosper, changes in these conditions prompted

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<sup>4</sup> Adrian Briggs, *The Principle of Comity in Private International Law*, 354 in RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 65, 85–86; Thomas Schultz & Niccolò Ridi, *Comity and International Courts and Tribunals*, FORTHCOMING.

<sup>5</sup> CHARLES I. (KING OF ENGLAND), HIS SPEECH MADE UPON THE SCAFFOLD AT WHITEHALL GATE, IMMEDIATELY BEFORE HIS EXECUTION, ON TUESDAY THE 30 OF JANUARY 1648: (1649).

<sup>6</sup> Thomas Schultz & Jason Mitchenson, *Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts*, 12 JOURNAL OF PRIVATE INTERNATIONAL LAW 344 (2016). See also, generally, Briggs, *supra* note 4.

<sup>7</sup> Laurence Collins, *Comity in Modern Private International Law*, in REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF SIR PETER NORTH, 95 (James Fawcett ed., 2002).

<sup>8</sup> As a general example, it can be added that a Westlaw search for “international comity” returned 1758 hits, of which 1295 concerned cases decided after 1995, and 782 after 2005. See also Donald Earl III Childress, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 UC DAVIS LAW REV. 11, 15 (2010).

<sup>9</sup> Joel R. Paul, *Comity in international law*, 32 HARV. INT. LAW J. 1, 78 (1991); Joel R. Paul, *The Transformation of International Comity*, LAW CONTEMP. PROBL. 19–38, 19 (2008).

<sup>10</sup> See *infra* Section I.

the notion to evolve, perhaps transforming, at least to some degree, into “an expression of unexplained authority, imprecise meaning and uncertain application.”<sup>11</sup> It is certainly true that the term has come to refer to a variety of practices, many of which may rightly be considered conceptually distinct from its understanding, though they share with it “certain methods, values, and justificatory rhetoric.”<sup>12</sup>

Be that as it may, it is undeniable that no legal system has given as much weight to the notion of comity as that of the United States of America: Its tumultuous history and peculiar development, in and by themselves, well warrants an in-depth study of the life of the concept in the USA. While the topic is discussed in a number of studies, most of them fail to consider the phenomenon in a broader dimension and thus do not properly appraise the peculiarity of the American understanding of the comity.<sup>13</sup>

But there is one more, equally compelling reason that prompts us to carry out this investigation: Legal ideas circulate today much in the same way they did in the early Nineteenth Century, when Justice Joseph Story relied on the authority of the Dutch jurist Ulrich Huber to write his influential *Commentaries*.<sup>14</sup> Inevitably, the American understanding of comity has proved persuasive. It has affected the development of legal doctrines elsewhere, and stimulated further reflection on the role of the concept, especially when employed by

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<sup>11</sup> Michael D Ramsey, *Escaping “International Comity,”* 83 IOWA LAW REV. 893, 893 (1997).

<sup>12</sup> Paul, *supra* note 6, at 21.

<sup>13</sup> Indeed, comity has been the object of three major studies, the findings of which the present article builds upon. See Paul, *supra* note 11; Childress, *supra* note 4; Dodge, *supra* note 4.

<sup>14</sup> JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC: IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (1834) § 29 ff.

prominent American scholars.<sup>15</sup> This has in turn prompted the revitalization of comity as a tool capable of alleviating problems of a global nature.<sup>16</sup>

The purpose of this study is thus, first, to contribute to the elucidation of the notion of comity as it is understood by American scholars and practitioners, and to illustrate the distinctiveness of this American understanding. Our research builds upon the existing literature and an extensive survey of Supreme Court and Federal Appellate decisions, covering more than two centuries' worth of judicial reasoning. Through our analysis, we aim to provide an account of how comity and its localised understanding evolved to meet unique historical and political circumstances. Accordingly, we will explore the significance of the notion—or, more correctly, several notions—of comity in shaping the American understanding of conflict, foreign relations law, and the concept of public international law jurisdiction.<sup>17</sup> We will then proceed to assess the degree to which the American understanding of comity has, by reason of its isolated development, influenced related doctrines elsewhere.

## II. THE PROBLEM OF COMITY: DEFINITIONS AND METHODOLOGY

### A. Acknowledging comity and defining it

Let us start from the beginning: Even by the most conservative assessment, the notion of comity is employed by nearly every common law court to an extent that is not negligible. Yet, there is comparatively little agreement as to what exactly comity is, what purposes it should serve and when and how it should operate. The problem is a significant one: On the one hand,

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<sup>15</sup> Above all ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 67 (2004).

<sup>16</sup> See for example YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003); Elisa D'Alterio, *From judicial comity to legal comity: A judicial solution to global disorder?*, 9 INT. J. CONST. LAW 394 (2011).

<sup>17</sup> On the relationship between private international law and the concept of jurisdiction in public international law, see ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW* 226–246, 303 (2009); CEDRIC RYNGAERT, *JURISDICTION IN INTERNATIONAL LAW* 157 (2008).

certain commentators tend to be adamantly dismissive of the notion—which, it should be pointed out, is quite unhelpful, as the notion does not for this reason cease to exist and be employed.<sup>18</sup> But even among those who do express a degree of interest and devote some scholarly attention to comity, views tend to diverge significantly.<sup>19</sup> What is more, definition attempts seem to be doomed at the outset, to the point that one of the leading British conflicts of law scholars dodged the question by first explaining what comity is *not*, and then attempting to provide a rather lengthy list of the concept’s distinctive characteristics.<sup>20</sup>

A casual reader could be forgiven for playing down the importance of defining comity as yet another purely academic quest. All the same, such a reader would be mistaken. What is at stake here is the answer to significant questions, such as: which law should apply to a given dispute; whether a court should be able to decline to exercise its jurisdiction; and what consequences should be attached to the sovereign status (or sovereign capacity) of a party to a dispute. It is disingenuous to think that the solution to these problems would be straightforward if the answer must be based—at least to some extent—on a notion so vaguely defined that it “invites intuitive adjudication, and hence litigation-inspiring *ex ante* unpredictability.”<sup>21</sup> And yet, it is arguable that the notion of comity is quite underserving of the measure of criticisms that it has received. Indeed, if it is so indeterminate, the impudent question could—with good reason—arise of how generations of common law judges managed to live with concepts as abstract as those of “equity” and “due process.”<sup>22</sup> Still, comity is treated with mistrust, and many have sought to look beyond the word’s “deceptively right ring, like

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<sup>18</sup> CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, 5 (James Fawcett et al. eds., 14th ed. 2008); See also, generally Louise Weinberg, *Against Comity*, 80 GEO LJ 53 (1991); Ramsey, *supra* note 13.

<sup>19</sup> See *infra*, section IV.

<sup>20</sup> Briggs, *supra* note 4 at 87, 180.

<sup>21</sup> Ramsey, *supra* note 13 at 894.

<sup>22</sup> See the discussion in N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U PA J INTL ECON L 601, 626 (2006).

good breeding and sweet disposition.”<sup>23</sup> Indeed, according to Andreas Lowenfeld, the wariness was such that the reporters of the Third Restatement on Foreign Relations Law avoided the word altogether, believing it too charged of “the idea of discretion or even political judgment,” preferring “reasonableness, which is conceived in terms of legal obligation.”<sup>24</sup>

It is perhaps for this reason that most American scholars discussing the subject attempt to anchor the discussion to formally strong authority: the definition of comity offered in the early landmark case *Hilton v. Guyot*. In the words of Justice Gray, comity

in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.<sup>25</sup>

The influence of this definition, quite possibly the most cited in scholarly and judicial writing far beyond the American panorama, is immeasurable.<sup>26</sup> It is thus unsurprising that American scholars would accept it — although with varying degrees of criticism and different adjustments. For example, Harold Koh’s monumental work on transnational litigation pays homage to this description, but clarifies that comity “flows from the respect that one sovereign is obliged to give to the sovereign acts of a coequal nation-state.”<sup>27</sup> It adds that the notion has been increasingly interpreted by American courts “as a reason why they should refrain from

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<sup>23</sup> Weinberg, *supra* note 20 at 59.

<sup>24</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403, Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, AM. J. INT. LAW 42–53, 52 (1995); Paul, *supra* note 11 at 29.

<sup>25</sup> *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

<sup>26</sup> Calamita, *supra* note 24 at 626.

<sup>27</sup> HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 19 (2008).

independent determination of cases under the law of nations.”<sup>28</sup> This statement, while not particularly helpful, has the merit of framing the issue in the broader perspective of a discourse on sovereignty and the allocation of regulatory authority. Indeed, as we will further discuss in Part III, comity is very much a predicate of the modern model of sovereignty and – more specifically – the idea of sovereign equality, as well as a parallel to the evolution of the international law on jurisdiction.<sup>29</sup>

This connection introduces one further significant problem, that is, what relevance should be attributed to the historical origin of the principle or to its connection with other notions (such as that of state jurisdiction). In other words, this is the question of whether a better understanding of how comity came to develop or a contextual awareness of a number of related notions may contribute to shedding light on its current use.<sup>30</sup> Depending on the answer to this question, the discussion on comity generally focuses on its value as a general, overarching principle of private international law,<sup>31</sup> or – abandoning “the language of the comity of sovereigns” and looking at the lower level of “what judges do and why they do it” – as a judicial tool.<sup>32</sup> In fact, whether the problem of comity can be resolved by rigidly sticking to either end of the spectrum is doubtful at best: The notion tenaciously resists traditional definition efforts, based on gradual abstraction aimed at establishing its essence, as it seems to have countless meanings. It is precisely for this reason that discussion on the doctrine ends up focusing on what comity *does* – and has done – rather than what it is.

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<sup>28</sup> *ibid.*

<sup>29</sup> As a leading scholar of public international law put it, “[c]omity arises from the horizontal arrangement of state jurisdictions”: JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 485 (8 edition ed. 2012); Dodge, *supra* note 4.

<sup>30</sup> On this point see Calamita, *supra* note 24 at 606 As the author argues, “the historic, common law principles of comity - in particular adjudicatory comity - are the very same principles that underlie current case law”.

<sup>31</sup> See *inter alia* Childress, *supra* note 4.

<sup>32</sup> Briggs, *supra* note 4 at 89.



**B. The judicial understanding of comity: methodological remarks**

According to Adrian Briggs, “legal thinking in the United States, from the earliest days to modern times, has found the principle of comity to be of assistance in getting the judge to the point where a case is decided.”<sup>33</sup> While this remark might perhaps overlook other roles of comity, it seems to accurately describe the use of the principle by American courts: A cursory search on any major database reveals a large number of mentions of comity in judicial decisions, which is hard to reconcile with the principle’s alleged demise. The table below shows the number of hits for different search operators. Our dataset included 104 Supreme Court cases and many Federal Appellate decisions. For Supreme Court cases, we employed Westlaw and LexisNexis to build a preliminary sample of all the decisions in which the term “comity” appeared; we then proceeded to discard the ones in which the word was employed in a purely domestic context. For Federal Court decisions, the same methodology could not be employed, as the results yielded by database searches were in a whole different order of magnitude – tens of thousands. Accordingly, we have elected to rely on a combination of Westlaw search operator, West key numbers, and frequency of citation in other decisions and scholarly pieces to identify a number of significant and influential rulings.

	“Comity” (unrestricted)	“Comity” (1995-)	“Comity” (2005-)	“International Comity”	“International Comity” (1995-)	International Comity (2005-)
SCOTUS	639	115	50	44	9	5
CTA	7,159	3046	1425	472	300	163
District Court	10000+	10000+	10000+	1093	911	573
All Federal	10000+	10000+	10000+	1758	1295	782

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<sup>33</sup> *Id.* at 78.

	"Comity" & "International" (unrestricted)	"Comity" & "International" (1995-)	"Comity" & "International" (2005-) <sup>34</sup>
SCOTUS	212	48	24
CTA	1995	1068	525
District Courts	7465	6010	4322
All Federal	10000+	7590	5147

True, these numbers, while telling, do not necessarily expose the whole picture: Indeed, in a very significant number of cases courts employ the term to refer to “other” comity doctrines, which are wholly domestic in nature and arise from the complex relationship between state and federal institutions that inform the law of the United States.<sup>35</sup> These doctrines are beyond the scope of the present article, which focuses instead on the uses of comity in cases where an “international” element is present – in which “cross-border elements are in need of careful treatment.”<sup>36</sup> It follows that this study will focus on federal decisions, much more likely to concern disputes in which the “cross-border elements” are truly international in nature. Such inevitable constraints, however, must not be perceived as a limitation, all the more so in a study concerned with the elucidation of a legal concept in a system where federal judges have long been identified as the main interpretive community.<sup>37</sup>

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<sup>34</sup> The search for “comity” and “international” was devised with the goal of avoiding searching for “international comity” only. While the search has yielded a number of false positives, it has revealed a number of cases in which instances of “international comity” had been labelled with the simple mention of “comity”.

<sup>35</sup> On the topic, see Michael Wells, *Role of Comity in the Law of Federal Courts*, *The*, 60 NCL REV 59 (1981); Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 NOTRE DAME REV 1309 (2014).

<sup>36</sup> Briggs, *supra* note 4 at 89; It could be objected that a domestic context should not automatically exclude the relevance of comity. This objection has some merit, but only insofar as a historical perspective is adopted: after all, much of the reflection on the topic was prompted by conflicts between the policies and legislations of American federate states. Story himself thought as much when he wrote that the issue of the application of foreign law was of paramount importance in the United States, “since the union of a national government with that of twenty-four distinct, and in some respects independent states, necessarily creates very complicated relations and rights between the citizens of those states, which call for the constant administration of extra-municipal principles”: STORY, *supra* note 16§ 9. While the current degree of integration is much greater today than it was in Story’s day, early reflection on the role of comity in this context is taken into account to properly explain the history of the principle.

<sup>37</sup> Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, HARV. LAW REV. 405–508, 405, 413 (1989).

### III. THE HISTORY OF COMITY IN AMERICAN LEGAL THINKING

#### A. Comity enters the United States

##### 1. *The sister notions of comity and sovereignty*

Comity, it has been observed, “is a concept with almost as many meanings as sovereignty.”<sup>38</sup>

This comparison is not accidental: Comity developed as a corollary of the invention of the concept of sovereignty, and the history of the former is very much an account of the latter’s creation, only told from a different perspective.<sup>39</sup>

The two narratives share the same starting point: the development of the Westphalian system. The consecration of the principles of territorial sovereignty and freedom from interference made personal statuses irrelevant in the face of the territorial law of the state. Compared to the previous approach, epitomized by the likelihood of witnessing a meeting between five men with no one law in common, this no doubt represented a fundamental shift.<sup>40</sup> Sovereign independence and non-interference served as the building blocks of the new world order,<sup>41</sup> but proved to be at variance with the transnational relations that formed the backbone of seventeenth-century European society and commerce.<sup>42</sup> It comes as no surprise that the doctrine of comity, meant to mitigate the adverse effect of strict territoriality, would develop in the Netherlands, a country that had much to lose from this tension. Following their

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<sup>38</sup> Anne-Marie Slaughter, *Court to Court*, AM. J. INT. LAW 708, 708 (1998).

<sup>39</sup> KURT LIPSTEIN, PRINCIPLES OF THE CONFLICT OF LAWS: NATIONAL AND INTERNATIONAL 8 (1981); Thomas Schultz & David Holloway, *Retour sur la comity (Première partie)*, J. DROIT INT. 863–866 (2011); Schultz and Holloway, *supra* note 3 at 571, 574. Thomas Schultz and Niccolò Ridi, ‘Comity and International Courts and Tribunals’, forthcoming.

<sup>40</sup> Hessel Yntema recounts the complaint of Saint Agobard against the *lex Gundobadi* of Burgundy: “Nam plerumque contingit ut simul eant aut sedeant quinque homines et nullus eorum communem legem cum altero habeat... Indeed, it frequently happens that five men get together or meet with each other and none of them has a law in common with any other.” Hessel E. Yntema, *The Comity Doctrine*, MICH. LAW REV. 9–32, 10 (1966).

<sup>41</sup> Harold G. Maier, *Resolving Extraterritorial Conflicts, or There and Back Again*, 25 VA J INTL L 7, 10 (1984).

<sup>42</sup> RODOLFO DE NOVA, HISTORICAL AND COMPARATIVE INTRODUCTION TO CONFLICT OF LAWS 435, 441 (1966); Schultz and Ridi, *supra* note 6.

independence from Spanish rule and their unification, the Low Countries found themselves in need of coping with the effects of territorial sovereignty: On the one hand, a weak central power left the provinces' jealousy of their different traditions, laws, and original privileges relatively unbridled. On the other hand, the Netherlands had become a major maritime and commercial power, and were mindful of the need to accord a favorable treatment to foreigners.<sup>43</sup> This context offered the ideal combination of "difference and deference,"<sup>44</sup> thus providing fertile ground for the need of rules capable of governing the allocation of regulatory authority.<sup>45</sup>

In the end, the question affected one fundamental problem, that of which law should govern a specific private legal relationship. It was in these circumstances that jurists such as Paulus Voet, his son Johannes, and, most notably, Ulrich Huber developed theories — new theories — to provide an answer to the conundrum.<sup>46</sup> These scholars, however, were mindful of the general importance of the issue: As Rodolfo de Nova points out, they did not seek to present their work as mere suggestions to Dutch courts, but rather as a new model with universal validity.<sup>47</sup>

The doctrine of comity was introduced, in a fairly primitive form, by Paulus Voet in a work published in 1661.<sup>48</sup> The learned treatise, "couched in a concise and sometimes crabbed style in the form of a catechism of questions and answers,"<sup>49</sup> conceived comity as a technique for mitigating the adverse effects of the inherent territoriality of statutes. In other words, the doctrine allowed states to give effect and recognition — *ex comitate* — to transactions concluded

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<sup>43</sup> Yntema, *supra* note 42 at 19.

<sup>44</sup> MILLS, *supra* note 19 at 45–46.

<sup>45</sup> Yntema, *supra* note 42 at 17; Paul, *supra* note 11 at 15.

<sup>46</sup> Arthur Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 COLUMBIA LAW REV. 189–206, 190 (1942).

<sup>47</sup> DE NOVA, *supra* note 44 at 449.

<sup>48</sup> PAULUS VOET, *DE STATUTIS EORUMQUE CONCURSU LIBER SINGULARIS* 156 (1661).

<sup>49</sup> Yntema, *supra* note 42 at 22.

outside the borders of the state concerned. Voet's theory seems to suggest that such recognition was to be considered fully discretionary. What is more, comity, in this sense, did not "so much operate as a constraint on the (extraterritorial) application of a forum State's law... but rather as a constraint on the exclusive territorial application of the forum State's law."<sup>50</sup> The point is worth mentioning because, almost forty years later, Paulus Voet's son, Johannes, stressed the importance of the fact that the extension of statutes beyond the territorial domain of a state was not constrained by any particular rule.<sup>51</sup> In his restatement of his father's doctrine, comity served the purpose of preserving "the primacy of the statute real, subject to such concessions as might be made by one nation to another."<sup>52</sup> In other words, the doctrine proved essential for the reconciliation of two diverging paradigms, but its application remained – at least at first glance – fundamentally discretionary.<sup>53</sup>

When the history of comity is so presented, one could be forgiven to read the work of the Dutch theorists as dismissing the old, universalist – or "international" – approach to questions of conflict of laws with a view to endorsing an attitude more consistent with the model of territorial sovereignty. In fact, as early as 1966 De Nova denounced such a conclusion as injudicious.<sup>54</sup> The tenuousness of the discretion thesis appears even more evident by reading the *magnum opus* of the most influential writer of the time on the topic of comity, Ulrik Huber's *De conflictu legum*.<sup>55</sup> One of the leading jurists of his day, Huber too devoted significant attention to the topic of the application of foreign law. Most notably, Huber formulated an

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<sup>50</sup> RYNGAERT, *supra* note 19 at 150.

<sup>51</sup> JOHANNES VOET, *COMMENTARIUS AD PANDECTAS*. (1698).

<sup>52</sup> Yntema, *supra* note 42 at 24.

<sup>53</sup> Schultz and Holloway, *supra* note 3 at 579.

<sup>54</sup> DE NOVA, *supra* note 44 at 449–450.

<sup>55</sup> The original text can be found in Ernest Gustav Lorenzen, *Huber's De Conflictu Legum*, in *SELECTED ARTICLES ON THE CONFLICT OF LAWS* (1947) It reads: "Rectores imperiorum id comiter agunt, ut cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potentati aut juri alterius impetrantes ejusque civium prejudicetur"; See also Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws: One Hundred Years after*, *HARV. LAW REV.* 15–38, 16 (1934); Paul, *supra* note 11 at 15; Schultz and Holloway, *supra* note 3 at 577.

elegant solution by the use of three “axioms,” the normativity of which remains a controversial issue in the modern debate on the doctrine of comity. He wrote:

(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond. (2) All person within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof. (3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such governments or of its subjects.<sup>56</sup>

The third axiom has long represented a controversial point:<sup>57</sup> What did Huber actually mean? What kind of discretion did he envisage for a sovereign and its courts? What was the nature and cogency of the obligation — provided that there was any — to apply foreign law? Huber’s work does not, in and by itself, provide simple answers to these hoary questions: But were they really appropriate to begin with? Two main points suggest otherwise.

First of all, Huber never employed the word *comitas*, let alone the expression *comitas gentium* (‘the comity of nations’), but restricted himself to choosing an adverbial — and possibly less charged — form, *comiter*, which —it is worth recalling— had been adopted by Paulus Voet.<sup>58</sup> The language adopted in the Dutch edition does not even mention any such term: Acutely aware of the importance of ensuring the smoothness of business transactions, Huber supports the discussion with the allegorical image of governments extending a hand to each other.<sup>59</sup> While linguistic exegesis can only play a small role in legal scholarship, this small detail may contribute to the clarification of the original doctrine. In particular, it allows the concept of

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<sup>56</sup> Lorenzen, *supra* note 57 at 403.

<sup>57</sup> See the discussion in Llewelyn Davies, *The Influence of Huber’s De Conflictu Legum on English Private International Law*, 18 BR. YEARB. INT. LAW 49 (1937); Lorenzen, *supra* note 57; Yntema, *supra* note 42; ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS 28 ff (1992).

<sup>58</sup> See for example VOET, *supra* note 50 at 143, 168; While Huber’s work was published before Johannes Voet’s *Commentarius*, he was undoubtedly familiar with the work of Paulus. See Yntema, *supra* note 42 at 29 ff.

<sup>59</sup> Schultz and Holloway, *supra* note 3 at 580.

comity to be revealed as the cornerstone of the building, rather than the building itself and as a whole. The point was lucidly highlighted by Campbell McLachlan:

Huber, Voet and those the jurists that followed them... used the concept of comity *as a springboard* from which they proceeded to develop a highly organized and sophisticated set of choice of law rules. In this sense, “comity” did not remain a vague desideratum – an invitation to replace law with its antithesis in mere courtesy and discretion. On the contrary, it supplied the basis for the elaboration of a detailed set of positive rules, grounded in practical reality.<sup>60</sup>

Indeed, the system at issue could not be faulted as primitive: The Dutch jurists *did* develop fairly advanced rules, which we might, with a modern mind-set, define as rules of private international law. As is well known, due to the rise of positivism, the whole field of conflict was being drawn into the preserve of the national legislator. And yet, the understanding of comity outlined above allows the reconciliation of its value with the idea of territoriality and the doctrine of supremacy of sovereign command.<sup>61</sup> Comity, in other words, can be considered the conceptual basis of the rules, rather than their formal source. The modern idea of the doctrine as necessitating exercises of discretion by a court does not follow directly from the essence of the principle.

The second point follows from the observation that Huber’s conception of international law was fundamentally a Grotian one.<sup>62</sup> His third axiom spells out an international usage – if not an international custom<sup>63</sup> – whereby “the effects of competent foreign laws are everywhere admitted, except when prejudicial to the forum State or its citizens, through the reciprocal

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<sup>60</sup> CAMPBELL MCLACHLAN, *LIS PENDENS IN INTERNATIONAL LITIGATION* 223 (2009) (emphasis added).

<sup>61</sup> The expression is, of course, a reference to Austin’s theoretical construction: see JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

<sup>62</sup> There is no question that Huber was familiar with Grotius, whom he cites in *De Conflictu Legum* too. See Lorenzen, *supra* note 38; See also Schultz and Holloway, *supra* note 1, at 578

<sup>63</sup> Note the Grotian expression “tacito populorum consensu” in § 1 of *De Conflictu Legum*. See the Latin wording in Lorenzen, *supra* note 57.

indulgence of the sovereign authorities in each State.”<sup>64</sup> This is no small detail: on the one hand, reliance on the *jus gentium* allowed Huber to universalize his maxims; on the other hand, it lends credibility to the view that Huber’s axioms were, at least to some extent, descriptive of then-current practices, and anticipative of their consolidation – which would have, in turn, yielded normative consequences – rather than simply prescriptive.

In this respect, remarks such as Dicey’s celebrated discussion on the application of foreign law as having little to do with courtesy between sovereigns fail to make the grade as a subtle critique of Huber.<sup>65</sup> Indeed, convenience and logic, rather than mere courtesy, were the goals with which the Dutch theorist was concerned – very much the same objectives that Dicey saw as best pursued without relying on his characteristic theoretical construct.<sup>66</sup> Needless to say, this was not the way Huber’s ideas were received in the common law world, where his writings eventually made an impact, due to unique circumstances, on the minds of students and practitioners of the law.<sup>67</sup> The scholar’s name became a shorthand to make a point on the supremacy of the forum’s law, in a corruption of the doctrine that was to a great extent a corruption of his legacy.

## 2. *Comity in the United States: Livermore, Kent and Story*

When the concept is conceived as the basis of certain rules, Samuel Livermore’s famous description of the expression “comity” as something “grating to the ear when it proceeds from a court of law” seems quite unfair and one-sided. “Comity between nations,” Livermore wrote, “is to be exercised by those who administer the supreme power. The duty of judges is to administer justice according to law, and decide between parties litigant according to their

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<sup>64</sup> Yntema, *supra* note 42 at 30.

<sup>65</sup> ALBERT VENN DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 10 (1896).

<sup>66</sup> *Id.* at 10.

<sup>67</sup> Davies, *supra* note 59 at 53; Schultz and Holloway, *supra* note 41 at 91.



rights.” And yet, Livermore and his passionate discussion of a point of law he regarded as fundamental played no small part in prompting a reconsideration of the concept of comity and the Dutch theories. But how did this happen?

According to Alan Watson, much can be traced back to the anger that Livermore, an influential attorney of civil-law Louisiana, felt towards the Anglo-American reliance on the Dutch jurists, and to his personal resentment against the judge who authored an influential opinion on conflict in a case where he happened to find himself on the losing side.<sup>68</sup> It has been argued that Livermore saw comity as allowing excessive discretion – a discretion, in other words, that international law did not allow.<sup>69</sup> Quite interestingly, he appeared rather ignorant and disdainful of Huber, whose authority may well have supported his thesis.<sup>70</sup> Whether Livermore’s view really was based on international law properly-so-called is at best doubtful: In his oft-cited *Dissertations*, he motivated the necessity of applying foreign law by reference to “a sense of mutual utility,” “arisen from a sort of necessity” and “the inconveniences which would result from a contrary doctrine.”<sup>71</sup> There is no question, however, that Livermore believed that the application of foreign law was conducive to maintaining peace, friendly intercourse, and even to “the general good”: in that, it would have pursued in the private sphere the same objective that the law of nations pursued in the public one.<sup>72</sup>

This treatment of comity and of the Dutch jurists’ theories was perhaps unsophisticated, but proved influential. True, it was only with Joseph Story’s work that comity eventually became an

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<sup>68</sup> WATSON, *supra* note 59 at 28–33. *Saul v. His Creditors*, 5 Mart. 569 (La. 1827).

<sup>69</sup> Paul, *supra* note 11 at 24; Paul, *supra* note 11 at 21; The expression in question is “something like an obligation upon sovereigns” SAMUEL LIVERMORE, *DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS* (1828)30.

<sup>70</sup> WATSON, *supra* note 59 at 32–33.

<sup>71</sup> LIVERMORE, *supra* note 71 at 28; Compare with the language adopted by STORY, *supra* note 16§ 35.

<sup>72</sup> LIVERMORE, *supra* note 71 at 30; In this regard, the theory is not too far away from Minor’s famous reference to comity as the basis of international law: RALEIGH C. MINOR, *CONFLICT OF LAWS, OR, PRIVATE INTERNATIONAL LAW* 5 (1901).

important element of the interface between public international law and American conflict of laws. However, Livermore's treatise, along with the case that prompted its creation, was quoted in the influential work of James Kent,<sup>73</sup> to whom Joseph Story felt intellectually indebted.<sup>74</sup> And indeed, not unlike Kent, the learned jurist felt that the issue was one of central importance for the management of frictions resulting from radically different state policies.<sup>75</sup> The issue of slavery was, of course, a central one.<sup>76</sup>

Story insisted that no national law could have, in principle, extraterritorial effect: In his view, this conclusion was the natural consequence of public law principles, and was also supported by Vattel's writings on the sovereign equality of nations in the field of public international law.<sup>77</sup> "This branch of public law," he wrote in his *Commentaries*, "may be fitly denominated private international law."<sup>78</sup> But Story's adherence to this view should not be mistaken for a belief that the application of foreign law descended from some perfect international obligation – in fact, his reliance on Huber's theories, which may well have

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<sup>73</sup> JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826) In reality, Kent attributed the work to Livermore with the title "Dissertations on Personal and Real Statutes", a corruption of the title of an earlier work, by the British scholar Henry, titled "Dissertation on Personal, Real and Mixed Statutes". Story, however, cites both authorities correctly STORY, *supra* note 16.

<sup>74</sup> WATSON, *supra* note 59 at 27–28.

<sup>75</sup> See for example the following passage: "To no part of the world is it of more interest and importance than to the United States, since the union of a national government with that of twenty-four distinct, and in some respects independent states, necessarily creates very complicated relations and rights between the citizens of those states, which call for the constant administration of extra-municipal principles." STORY, *supra* note 16 § 9.

<sup>76</sup> See generally PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (2013); DODGE, *supra* note 31 at 19. See also Story's opinion in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

<sup>77</sup> STORY, *supra* note 16 § 8. Consider the influence of this dictum in *Hilton and Guyot*: "International law, in its widest and most comprehensive sense-including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation-is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination." 159 U.S. 113 (1895) at 163.

<sup>78</sup> *Id.* § 9; A citation of Vattel and Huber in the same decision might appear surprising to the modern reader. It was, however, hardly surprising at the time, nor was it unprecedented. For example, the authority of both Huber and Vattel was cited in *Denesbas v. Berquier*, an 1808 Pennsylvania conflicts case relating to personal property under a will. Indeed, this constitutes another indication of the perceived contiguity—or, more precisely, of the absence of any real separation—of public and private international law. See WATSON, *supra* note 59 at 51; For an analysis of the issues concerning the questions concerning the unity of private and public international law see MILLS, *supra* note 19.

supported very different conclusions, has been described as the result of a misunderstanding.<sup>79</sup> Indeed, it is often argued that, to the Dutch theorist, the application of foreign law had a wholly different degree of bindingness.<sup>80</sup> To the American jurist, the state retained the fundamental ability to decide whether to give effect to foreign law: There was no duty to do so, but more of an “imperfect obligation, like that of beneficence, humanity or charity.”<sup>81</sup> “Every nation,” he continued, “must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions, on which its exercise may be justly demanded.”<sup>82</sup> An imperfect obligation indeed, which derived “from mutual interest and utility, from a sense of the inconveniences” “which would result from a contrary doctrine.”<sup>83</sup>

The centrality of state discretion in Story’s treatment comity is the crucial issue — indeed, one that makes Watson’s claim that he did, to some extent, misinterpret Huber seem not too harsh an assessment.<sup>84</sup> The point is not the claim that the predominance of Story’s authority over Huber’s altered the outcome of cases such as the infamous *Dred Scott v. Sandford*<sup>85</sup> due to the possibility — consistent with the former’s theory, but not with the latter’s — of exercising a choice as to which law to apply.<sup>86</sup> In fact, the point is the very centrality of the concept of discretion in Story’s theory. As Joel Paul observed, Story’s solution was an exceptionally elegant

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<sup>79</sup> For an in-depth analysis of the issue see WATSON, *supra* note 59.

<sup>80</sup> Yntema, *supra* note 42 at 29 (arguing that Huber saw the extraterritorial extension of statutes as mandated by the *jus gentium*); Davies, *supra* note 59 at 57; For a powerful rejection of the idea whereby comity should be the source of a perfect obligation to apply foreign law see Calamita, *supra* note 24 at 617.

<sup>81</sup> STORY, *supra* note 16§ 33.

<sup>82</sup> *Id.* § 33.

<sup>83</sup> *Id.* § 33; LIVERMORE, *supra* note 71 at 28.

<sup>84</sup> On the reasons why a misunderstanding seems a more viable hypothesis than an deliberate, if subtle, rejection see WATSON, *supra* note 59 at 72.

<sup>85</sup> 60 U.S. 393 (1856).

<sup>86</sup> This conclusion is grounded on § 3 of Huber’s *De Conflictu Legum*, where it is said that “all transactions and acts, in court as well as out, whether mortis causa or inter vivos, rightly done according to the law of any particular place, are valid even where a different law prevails, and where, had they been so done, they would not have been valid.” Lorenzen, *supra* note 57 at 404. Watson also observes that in case concerning slavery, the law of a slave-owning state could not be rejected on the basis of its being revolting, as Huber’s third axiom would be intimately linked to the law of nations, which ostensibly did not yet contain a prohibition to that effect: WATSON, *supra* note 59 at 64. It is arguable that this inference amounts to reading too much in § 8 of *De Conflictu Legum*.

one, as it managed to universalize conflict and, at the same time, reflect his policy concerns by affirming the primacy of the forum's law. What is more, this thesis was in line with the rise of positivism – a characteristic that helped it survive and further develop in the American setting.<sup>87</sup>

Given the popularity of his writings and the impact that they had on subsequent cases, a discussion of Story's engagement with the idea of comity has traditionally represented the ideal *dénouement* of an historical analysis of the concept – virtually all the studies cited in this article prove as much. There are good reasons to respect the tradition: Upon publication of the *Commentaries*, Story became the main authority on the issue of comity, and his legacy was – at least formally – very much alive one century and a half later.<sup>88</sup> At the same time, it must be stressed that it is unthinkable to resolve cases involving comity considerations with the simple application of Story's maxims. Comity – not unlike its parent concept, sovereignty – is inherently context-dependent. Its meaning and implications, as we seek to elucidate in the next sections, transformed as a reflection of the changes in the status quo. Such shift is investigated in the following sections, under the lens provided by almost two centuries of judicial decision-making.

#### IV. THE JUDICIAL EVOLUTION OF COMITY

##### A. “Legislative” or “prescriptive” comity: restraint and recognition

The history of comity, as we have seen above, clearly shows that the principle was borne out of the need to make sense of a new model of allocation of regulatory authority. With a central

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<sup>87</sup> Paul, *supra* note 11 at 25.

<sup>88</sup> See the citation of the *Commentaries* in Justice Scalia's dissent in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993).

role played by the principle of territoriality, coupled with the need to cater to the needs of commerce and friendly relations, comity proved successful as a flexible mediating principle.

The idea of “flexibility” has long been attached to comity, but the term is somewhat misleading: Indeed, as Adrian Briggs has argued, it suggests an understanding of comity more akin to “the way in which the common law reaches a conclusion which its rules do not otherwise allow it to find,” which is regrettable.<sup>89</sup> Rather, comity, is “flexible” because it takes different shapes depending on the goals states need to accomplish. Consider the case of what is generally termed “legislative comity”: On the one hand, the principle mandates – or, at the very least – justifies the recognition of foreign law, in deference to the regulatory power of a foreign sovereign. On the other hand, and at the same time, it actively limits the reach of the law of the state acting according to comity, in an effort to avoid unreasonable interferences with the counterpart’s regulatory power. According to William Dodge, these are but two sides of the same coin:<sup>90</sup> In other words, recognition and restraint are two faces of “prescriptive comity.”<sup>91</sup> To be sure, this conclusion appears sound. What is more, it appears to be a logical corollary of the most authoritative statement of the doctrine, Justice Gray’s majority opinion in *Hilton v. Guyot*, where it was famously affirmed that “[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.”<sup>92</sup>

It is possible to subscribe to this conclusion, but it must be recognized that it is premised on the idea that recognizing foreign law and limiting the state’s own are subject to different

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<sup>89</sup> Briggs, *supra* note 4 at 87.

<sup>90</sup> Dodge, *supra* note 4 at 2079.

<sup>91</sup> The expression first appeared in Justice Scalia’s dissent in *Hartford Fire Ins. Co. v. California* 509 U.S. 764, 817 (1993). The adjective “prescriptive” is generally used to refer to the concept of “jurisdiction to prescribe.” See ANDREAS F. LOWENFELD, PUBLIC LAW IN THE INTERNATIONAL ARENA: CONFLICT OF LAWS, INTERNATIONAL LAW AND SOME SUGGESTIONS FOR THEIR INTERACTION (1980).

<sup>92</sup> 159 U.S. 113, 163. For a similar phrasing in a prior decision, see *Crapo v. Kelly*, 83 U.S. 610, 642-3 (“According to my view, whilst the disposition of his movable property by the owner is respected by the laws of all States everywhere, the laws of any particular State and transfers by operation of law, have no extra-territorial force which other States will concede, except by comity.” (Bradley J dissenting)). On the status of *Hilton* as a the “classic statement” of the doctrine see Paul, *supra* note 11 at 27.

outer limits: In particular, the international law of jurisdiction plays a major role in the latter, but only a very minor one in the former.<sup>93</sup> What is more, the interplay between comity and international law – at best, a reasonably complex matter – is rendered particularly puzzling by the adoption of the adjective “prescriptive,” which, while appropriate to describe their role in this area, tends to add to the confusion. Finally, not unlike in the case of adjudicatory comity, the Restatement (Third) of Foreign Relations Law provides guidance in cases concerning the extraterritorial application of United States law, but sheds little light on the matter of recognition of foreign acts. Reasons of coherence and homage to tradition suggest that the two issues be treated under the same heading, but due consideration should be paid to the dissimilarities discussed above.

*1. Using comity to grant recognition to the law and the acts of other states*

While *Hilton v. Guyot* remains the most well-known decision on recognition in general, Statements of the Supreme Court invoking comity to allow the application of foreign law and acts predate it by almost one full century. As early as 1797 the Supreme Court had stated that in *Emory v. Grenough* that

the laws of one commonwealth, cannot affect the integral parts, the territory of another commonwealth... it cannot be done by the immediate force and operation of a foreign law, but with the concurring consent of the supreme power of the other government, which gives an effect to foreign laws exercised upon property within its own jurisdiction, without any prejudice

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<sup>93</sup> We are restating the current understanding of the operation of the rules of public international law in this context, not claiming that such rules are inherently incapable of governing the recognition of foreign law. This is clearly not the case: Not only do a number of international instruments deal specifically with these matters, but it was observed as early as the 1930s that there may be cases in which the private international law requiring the recognition of foreign law would be overridden by the application of rules of public international law. See Alexander P. Fachiri, *Recognition of Foreign Laws by Municipal Courts*, 12 BRIT YB INTL L 95, 103 (1931). Further, and while a discussion of this issue is beyond the scope of the present study, certain rules of private international law may be – and, in fact, might have been – accorded the status of “general principles of law” in the sense of Article 38(1)(c) of the Status of the International Court of Justice and its predecessor, the PCIJ Statute. See *Serbian and Brazilian Loans cases*, *France v. Yugoslavia*; *France v. Brazil* (1929) PCIJ Ser A, Nos. 20–1; MILLS, *supra* note 19 at 214, 230.

being received to its sovereignty or the rights of its citizens, regarding the mutual convenience of the two nations or governments, which is the foundation of all these rules. [T]hat it is not so much by force of law, as by the consent of the parties reciprocally communicating their rights to each other, by which means a change, or modification of property may arise, not less from matrimony than any other contract.<sup>94</sup>

The decision, which was not immediately followed by other Supreme Court pronouncements invoking comity in the context of the recognition of foreign law, contains a statement of the doctrine almost as clear as the one contained in *Hilton* – indeed, all the elements of a traditional comity analysis are present.

It was Justice Taney's 1839 opinion in the domestic case *Bank of Augusta v. Earle*, however, that brought the discussion of comity even closer to Story's theories. The decision which has been called "the original fountain head of the law of foreign corporations in America"<sup>95</sup> and had its drafter privately applauded by Story himself,<sup>96</sup> referred to the *Commentaries* to strengthen the proposition that foreign companies could, lacking an express prohibition, make business in another state.<sup>97</sup> Most importantly, it linked the notions of comity and sovereignty in the most principled manner to date:

The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. But it contributes so largely to promote justice between individuals

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<sup>94</sup> 3 U.S. 369 (Dall.), 374. The case contains an extract of Huber's *De Conflictu Legum* by Alexander Dallas. See Dodge, *supra*, note 11.

<sup>95</sup> GERARD CARL HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW: A CONTRIBUTION TO THE HISTORY AND THEORY OF JURISTIC PERSONS IN ANGLO-AMERICAN LAW 42 (1918).

<sup>96</sup> THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1835-1864, 75.

<sup>97</sup> "The Court can perceive no sufficient reason for excluding from the protection of the law the contracts of foreign corporations; when they are not contrary to the known policy of the state, or injurious to its interests... It is but the usual comity of recognising the law of another state. The states of the Union are sovereign states; and the history of the past and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent". *Bank of Augusta v. Earle*, 38 U.S. 519, 520, (1839).

and to produce a friendly intercourse between the sovereignties to which they belong that courts of justice have continually acted upon it, as a part of the voluntary law of nations.<sup>98</sup>

While *Earle* was a domestic case, its implications were clearly visible in *Canada Southern Railway. Co. v. Gebhard*.<sup>99</sup> This bankruptcy case concerned a Canadian railway company that was reorganized through a plan agreed upon by the majority creditors and the Canadian Parliament, who then passed a statute to bind the minority creditors. In a suit brought by an American resident, and faced with the question of giving effect to the Canadian statute, the Supreme Court reasoned, predictably, that “the laws of a country have no extraterritorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country.”<sup>100</sup> It followed that “every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government.”<sup>101</sup> Justice Harlan, however, dissented, arguing for a more nuanced analysis. In his view, comity was not sufficient reason to enable a foreign corporation to “benefit, in our courts—to the prejudice of our own people and in violation of their contract and property rights—of a foreign statute which could not be sustained had it been enacted by congress or by any one of the United States.”<sup>102</sup> But was it really the case? Indeed, the proposition is particularly interesting insofar it also echoes the domestic case *Ogden v. Saunders*,<sup>103</sup> in which Chief Justice Marshall authored a powerful dissenting opinion — joined by none other than Joseph Story — arguing that the “single question for consideration” was whether the law of the act of discharge was repugnant to the constitution of the United States.<sup>104</sup>

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<sup>98</sup> *Id.*, 589 and *passim*.

<sup>99</sup> 109 U.S. 527 (1883).

<sup>100</sup> *Id.* at 536.

<sup>101</sup> *Id.* at 537.

<sup>102</sup> *Id.* at 539.

<sup>103</sup> 25 U.S. 213.

<sup>104</sup> *Id.*, 332. See also Recognition of Foreign Bankruptcy Discharges, 47 YALE LAW J. 1020–1023 (1938).



Contrary to the enforcement of foreign judgments, it does not appear that that reciprocity has ever had a significant role to play with regard to the recognition of foreign law in American courts. It must be pointed out, however, that such matters were, too a large extent, removed from this sphere by the Court's decision *Erie R. Co. v. Tompkins*<sup>105</sup> and *Klaxon Co. v. Stentor Electric Mfg. Co.*,<sup>106</sup> which put back such private international law questions firmly within the domain of state law.<sup>107</sup>

## 2. *Using comity to limit the reach of American law*

*Antitrust:* At the turn of the millennium, Spencer Weber Waller penned a powerful analytical article in which he declared that comity had entered its twilight hours.<sup>108</sup> The principle, he said, was no longer important because "its advocates" had, at the same time, achieved a success and suffered a loss. On the one hand, the demands of comity were now more often satisfied by the increasingly cautious attitude of the United States in dealing with foreign interests; on the other hand, engaging in a comity analysis still fell severely short of being a requirement for courts tasked with cross-border cases.<sup>109</sup> Most importantly, the principle had ceased to matter because the United States was no longer "the world's antitrust policeman": to Waller, comity had been a valuable tool, but the time was ripe to "say goodnight to an old friend."<sup>110</sup>

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<sup>105</sup> 304 U.S. 64, 79 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.").

<sup>106</sup> 313 U.S. 487, 496 (1941) (stating that "the prohibition declared in *Erie Railroad v. Tompkins* against such independent determinations by the federal courts extends to the field of conflict of laws").

<sup>107</sup> On the implications of *Erie* on private and public international law see, *inter alia*, Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT. LAW 740-743 (1939); Donald Earl Childress III, *When Erie Goes International*, 105 NORTHWEST. UNIV. LAW REV. (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1691799](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691799) (last visited Apr 3, 2016), linking the Court's approach in *Klaxon* "to the fact that Justice Story's comity doctrine had been replaced by the time of *Erie* with Joseph Beale's "vested rights" approach, which was influential during the first half of the twentieth century."

<sup>108</sup> Spencer Weber Waller, *Twilight of Comity, The*, 38 COLUMBIA J. TRANSNATL. LAW 563 (1999).

<sup>109</sup> *Id.* at 565.

<sup>110</sup> *Id.* at 566. For a partially diverging assessment see KOH, *supra* note 29 at 60.

Waller has recognized a number of crucial characteristics of comity, for instance that it is the result of historical contingency and that it is not a prerogative of courts only. While his article admittedly focused on antitrust issues, it does not seem apparent from even a cursory review of American case law that international comity did in fact come upon its demise.

To understand the point, it is helpful to start from the beginning. For a long time, comity has played a crucial role in limiting the reach of United States law. It has done so by acting as an upper limit to the exercise of jurisdiction or an interpretive canon capable of making sense of ambiguous statutes and treaties,<sup>111</sup> counselling restraint or a degree of intrusiveness depending on the interests at issue and the context.

While previous cases might be read to the same effect, the first instance of the use of comity to control the extraterritorial effect of American law is traditionally found in *American Banana Co. v. United Fruit Co.*<sup>112</sup> An antitrust case, the dispute was noteworthy in that it concerned acts committed in Costa Rica and Panama in violation of American antitrust law. Delivering the opinion of the Court, Justice Holmes observed that the case was built on several “rather startling propositions,” chief among them “the fact the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other

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<sup>111</sup> An early example is provided by the *Wildenhus's Case* 120 U.S. 1, 12 (1887), a case dealing with an homicide committed aboard a ship flying the Belgian flag. A treaty between the United States and Belgium stated that the jurisdiction of local courts should have been excluded for such offences “[e]xcept in the case where the peace of the port shall have been compromised.” *Id.* at 4. Faced with the question of whether this was the case, the Supreme Court discussed the rationale of this provision: “And so by comity it came to be generally understood among civilized nations that all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require. But, if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions.” *Id.* at 12.

<sup>112</sup> 213 U.S. 347 (1909).

states”; it was thus “surprising to hear it argued that they were governed by the act of Congress.”<sup>113</sup> Citing an English landmark case<sup>114</sup>, Holmes concluded that “all legislation was *prima facie* territorial,” and with good reason too, for concluding otherwise — here, disregarding the role of local law in governing the legality of the acts — would have been unjust and “an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.”<sup>115</sup>

*American Banana* relies heavily on comity — the idea is pervasive, if the invocation scarce. Its lesson is that legislation is presumed to be territorial, though there may be cases in which it is not, and other ones yet where no obstacle to regulation exists because there is simply no sovereign to offend.<sup>116</sup> Its legacy, on the other hand, was relatively short-lived.<sup>117</sup> The changed circumstances of transnational commerce — and perhaps the awareness of a different attitude towards jurisdiction in international law in the wake of the *S.S. Lotus* decision by the Permanent Court of International Justice,<sup>118</sup> which embodies the belief that states have a wide measure of discretion in determining the limits of their jurisdiction — brought the Court of Appeals of the Second Circuit (the court of last resort as indicated by the Supreme Court) to partially reverse this approach in *United States v. Aluminum Corporation of America* (“*Alcoa*”).<sup>119</sup>

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<sup>113</sup> *Id.* at 355.

<sup>114</sup> *Ex Parte Blain*, L.R. 12 Ch. Div. 522, 528.

<sup>115</sup> 213 U.S. 347, 357, citing *Phillips v. Eyre*, L.R. 4 Q.B. 225, 239. It must be observed that this English case introduced a two-limbed test of “double actionability” (or “criminality”), which was applied until a different rule was adopted in *Boys v Chaplin*, [1969] 2 All ER 1085. According to Koh, *American Banana* is as much a result of considerations of comity as it is of the application of rules of conflict, as the acts in question were not prohibited in the states where they had been committed and did not therefore satisfy the English test: see KOH, *supra* note 29 at 60.

<sup>116</sup> 213 U.S. 347, 355. See also Stephen D. Piraino, *Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act*, A, 40 HOFSTRA LAW REV. 1099, 1103 (2011).

<sup>117</sup> The Supreme Court held in *Kirkpatrick* held that *American Banana* had been “substantially overruled” by *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690, 704 (1962).

<sup>118</sup> SS ‘*Lotus*’ (*France v. Turkey*) (1927) PCIJ Ser. A, No. 10 253. See also KOH, *supra* note 29 at 59–60.

<sup>119</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

While other decisions had progressively moved away from *American Banana*,<sup>120</sup> the opinion was a true turning point. Writing for the Court, Judge Learned Hand affirmed that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.”<sup>121</sup> The decision does not mention comity in the least — though its echoes can perhaps be perceived in the discussion of the issue of extraterritoriality<sup>122</sup> — and introduced a test allowing the application of American antitrust law to be triggered by acts committed abroad, provided that they would have been unlawful if committed in the United States and were intended to and actually did cause — an anticompetitive effect.<sup>123</sup> Remarkably, the decision managed to pay lip service to *American Banana*. Half a century on, a number of things can be traced back to this seminal case: The ideas of effects doctrine and protective principle as discussed in the Restatement; the “nationalist jurisprudence” that culminated in *Hartford Fire*; and above all, the growing willingness of American courts to interfere. And yet, the significance of comity goes hand in hand with the potential for interference warranted by grounds of jurisdiction that can be understood as “virtually unbounded in scope.”<sup>124</sup>

While early on and in certain areas the presumption against extraterritorial effect of American law continued to operate in the traditional fashion,<sup>125</sup> antitrust cases remained

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<sup>120</sup> See *United States v. Pacific & Arctic Railway & Navigation*, 228 U.S. 87 (1913); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

<sup>121</sup> *Id.* at 443.

<sup>122</sup> *Id.* (“Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers.”). The statement was quoted to this effect in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976). See also Piraino, *supra* note 118 at 1105.

<sup>123</sup> 148 F.2d 416, 444 (2d Cir. 1945).

<sup>124</sup> Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. LAW REV. 0, 151 (2010).

<sup>125</sup> See for example the maritime cases *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *International Longshoremen's Ass'n, AFL-CIO v. Allied Intern., Inc.*, 456 U.S. 212 (1982).

fundamentally different. The new approach was codified in the Ninth Circuit case *Timberlane Lumber Co. v. Bank of America*.<sup>126</sup> The case generated a great deal of controversy and academic commentary, but for our purposes it is sufficient to mention that it introduced a tripartite analysis requiring “some effect actual or intended on American foreign commerce”; an effect “sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws”. Most radically, it introduced the requirement of an interest of the United States strong enough – “including the magnitude of the effect on American foreign commerce” – to justify an assertion of extraterritorial authority, as the substantiality test could not be considered, in and by itself, “a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness.”<sup>127</sup> The need to establish the existence of such an interest would have been consistent with a “jurisdictional rule of reason,” and required an appraisal of a number of elements such as

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.<sup>128</sup>

In short, *Timberlane* found the solution set out in *Alcoa* wanting – or “incomplete, because it fails to consider the interests of other nations in the application or non-application of

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<sup>126</sup> 549 F.2d 597.

<sup>127</sup> *Timberlane*, 549 F.2d 597, 613.

<sup>128</sup> *Id.* at 613-614.

United States law”<sup>129</sup>— and introduced interest-balancing to the picture.<sup>130</sup> What is more, it did so based on comity.<sup>131</sup> It bears noting that this approach was more reflective of the *Zeitgeist*, as regulation was now to be assumed to have some extraterritorial effects,<sup>132</sup> and its eventual fortune was no accident: The *Timberlane* interest-balancing methodology was incorporated in the Restatement (Third) of Foreign Relations law. Yet, the Restatement does not mention the term “comity,” perhaps “because the reporters believed that comity carries too much of the idea of discretion or even political judgment, as contrasted with the principle of reasonableness, which is conceived of in terms of legal obligation,”<sup>133</sup> and its commentary seems to suggest a qualification as an international legal obligation.<sup>134</sup> To some extent, this was due to the fact that the *Timberlane* approach had come under attack in the influential case *Laker Airways Ltd. v. Sabena, Belgian World Airlines*,<sup>135</sup> where it was memorably held that “[i]f promotion of international comity is measured by the number of times United States jurisdiction has been declined under the “reasonableness” interest balancing approach, then it has been a failure.”<sup>136</sup> In the majority opinion, Judge Wilkey found that the notion of comity had been stretched beyond its bounds, relying on *Hilton v. Guyot* to state that “comity ‘never obligates a national forum to ignore the rights of its own citizens or of other persons who are

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<sup>129</sup> Lowenfeld, *supra* note 26 at 44.

<sup>130</sup> 549 F.2d 597, 613-614.

<sup>131</sup> Katherine J. Florey, *State Law, US Power, Foreign Disputes: Understanding the Extraterritorial Effect of State Law in the Wake of Morrison v. National Australia Bank*, 92 BOSTON UNIV. LAW REV., 543 (2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2224207](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2224207) (last visited Mar 10, 2016).

<sup>132</sup> See for example the European Woodpulp cases, where comity arguments were raised by a number of Canadian applicants contending that by regulating their conduct—relating to activities performed outside of, but having effects within Europe—the Commission had ‘infringed Canada’s sovereignty and thus breached the principle of international comity. The Court swiftly dismissed the argument, stating that it amounted to questioning the Community’s jurisdiction to apply its competition rules. See: Case C-89/85, *Ahlström v Commission (Woodpulp II)*, [1993] ECR 1307. See also: Schultz and Ridi, *supra* note 6.

<sup>133</sup> Lowenfeld, *supra* note 26 at 52 The author does, however, note that “If agreement can be reached or approached on content, it may not be worthwhile continuing to debate the terminology”.

<sup>134</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403.

<sup>135</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

<sup>136</sup> *Id.* at 950.

under the protection of its laws,”<sup>137</sup> and remained critical of the difficulty of reconciling interest-balancing with the function of courts, which he urged were not “organs of political compromise.”<sup>138</sup>

It was, in any event, with *Hartford Fire Ins. Co. v. California*<sup>139</sup> that the Supreme Court finally seized an opportunity to discuss comity in this context again. Often hailed as a “death blow” to the principle,<sup>140</sup> the case concerned the conduct taken by American and British reinsurance and co-insurance companies, which had conspired to limit their offering in the United States, with anticompetitive consequences stretching to the United States. The London reinsurers argued that the Sherman Act did not apply to them, and justified the claim on the basis of comity: The activities they had carried out, they contended, were lawful in the United Kingdom, which had “established a comprehensive regulatory scheme governing the London reinsurance markets, and clearly has a heavy “interest in regulating the activity.”<sup>141</sup> The majority, however, was relatively unmoved by the claim. In the end, the Court held – though by a small margin – that it was not enough for the conduct of the reinsurers to be compliant with foreign law when compliance with foreign *and* American law was possible. The Court held that only a “true conflict” would have imported considerations of comity in resolution of the dispute and, since the situation in the case at issue did not amount to one, comity was no ground to decline the court’s jurisdiction.<sup>142</sup> In the powerful dissent he penned for the minority, destined to be – with all its wisdom and its deficiencies – more deserving of doctrinal attention than the majority opinion, Justice Scalia spotted the main shortcomings of

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<sup>137</sup> *Id.* at 943. This judgment may have been influenced by a seminal – and skeptical – article by Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. LAW 579–597, 590–91 (1983) and *passim*. See Karl M. Meessen, *Antitrust Jurisdiction under Customary International Law*, 78 AM. J. INT. LAW 783–810, 788 (1984).

<sup>138</sup> *Laker*, 731 F.2d at 953.

<sup>139</sup> 509 U.S. 764 (1993).

<sup>140</sup> Waller, *supra* note 110 at 564.

<sup>141</sup> *Hartford Fire*, 509 U.S. at 819 (Scalia J), citing Restatement (Third) of Foreign Relations Law.

<sup>142</sup> In this case, the court concerned was the District Court for the Northern District of California.

the decision. As he observed, the question should not have been one of jurisdiction of the courts, but rather one “of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct.”<sup>143</sup> Citing Story and his *Commentaries*, Scalia lectured on how the precedents cited by the majority did not refer to

the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed “prescriptive comity”: the respect sovereign nations afford each other by limiting the reach of their laws... comity in this sense includes the choice-of-law principles that, “in the absence of contrary congressional direction,” are assumed to be incorporated into our substantive laws having extraterritorial reach. Considering comity in this way is just part of determining whether the Sherman Act prohibits the conduct at issue.<sup>144</sup>

On this point, Scalia’s was absolutely right, and it is possibly a matter of regret that he would reinforce an argument built on choice of law<sup>145</sup> with a confusing allusion to the public international law limits on jurisdiction to prescribe.<sup>146</sup> As we explained, comity *presupposes* the existence of any such jurisdiction – be it to prescribe, adjudicate, or enforce. It is unsurprising that it was Scalia’s version that prevailed in the subsequent Supreme Court opinion *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,<sup>147</sup> where it was “principles of prescriptive comity” counselled against the Court of Appeals’ interpretation of United States antitrust law: “[I]f America’s antitrust policies could not win their own way in the international marketplace for such ideas,

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<sup>143</sup> *Hartford Fire*, 509 U.S. at 813 (Scalia J).

<sup>144</sup> *Id.* at 817-8. Dodge observes – correctly – that this is not what Story meant, because in his time Courts did not have the authority to decline jurisdiction. *cite to Dodge*. This is true, but it might be added that, before *International Shoe* *cite*, courts did not have extraterritorial jurisdiction anyway (except, of course, in admiralty cases) If this detail is taken into account, Scalia’s “rhetorical flourish” does not appear to be inconsistent with Story’s thinking. *See Dodge, supra* note 4 at 2106-7.

<sup>145</sup> *Hartford Fire*, 509 U.S. at 818 (Scalia J) (citing, among others, *Lauritzen*, 345 U.S. 571 (1953)).

<sup>146</sup> *Id.* at 815-6 (Scalia J) (citing the canon of interpretation set out by Chief Justice Marshall in *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) (“[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.”)).

<sup>147</sup> 542 U.S. 155 (2004).



Congress, we must assume, would not have tried to impose them in an act of legal imperialism.”<sup>148</sup>

But was this a return to comity? *Hartford Fire* decision did strike a blow to the principle that is hard to understate. Consider, for instance, *United States v. Nippon Paper Indus. Co.*,<sup>149</sup> an antitrust case four years after *Hartford Fire*: The First Circuit affirmed that comity was “more an aspiration than a fixed rule, more a matter of grace than a matter of obligation. In all events, its growth in the antitrust sphere has been stunted by *Hartford Fire*.”<sup>150</sup> The conclusion in this case was that wholly foreign conduct having an intended and substantial effect in the United States could form the basis for *criminal* prosecution under American antitrust law, a finding hard to reconcile with any understanding of comity. *Empagran* too is not too far a stretch from *Hartford Fire*, as comity was grounds for the Court to dismiss the claims relating to alleged foreign damages, but not those concerning domestic harmful effects.<sup>151</sup> In a concise article on the topic, Joel Paul made the argument that this conclusion is problematic in that the Court appeared to pay homage and deference to the market, rather than to a sovereign.<sup>152</sup> Whether this was the case is questionable, and the idea that “[d]eference to the Market has nothing to do with respect for foreign law or private parties” might be criticized in light of the historical roots of comity.<sup>153</sup> In these respects, the court in *Empagran* did attempt to strike a balance, but while it claimed to construe “ambiguous statutes to avoid unreasonable interference with other nations' sovereign authority,” it arguably fell short of the mark by leaving untouched an approach allowing for intrusive regulatory interference — rather than

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<sup>148</sup> *Id.* 169.

<sup>149</sup> 109 F.3d 1, 9 (1st Cir. 1997).

<sup>150</sup> *Id.*, 8 (1st Cir. 1997).

<sup>151</sup> 542 U.S. 155, 159 (2004).

<sup>152</sup> Joel R. Paul, *Transformation of International Comity, The*, 71 LAW CONTEMP. PROBL. 19, 36 (2008).

<sup>153</sup> *Id.* at 38.

helping, as it professed, “the potentially conflicting laws of different nations work together in harmony”.<sup>154</sup>

On the whole, the “breathhtakingly broad”<sup>155</sup> holding of *Hartford Fire* has made it difficult for courts to engage in a comity analysis where a “true conflict” cannot be identified, and it is possibly responsible for much terminological and conceptual confusion, so that while courts in subsequent cases are more critical of this approach, it is sometimes difficult to tell where disagreement ends and misunderstanding begins.<sup>156</sup>

*Outside the antitrust context:* for a long time, comity remained relatively absent from the debate on extraterritoriality in cases not concerning antitrust, though similar notions were often cited.<sup>157</sup> It may be argued that the absence of comity might be imputed to something more than mere terminological variety. For example, in the 1991 case *EEOC v. Arabian American Oil Co. (Aramco)*,<sup>158</sup> the principle was only mentioned in the dissenting opinion of Justice Marshall.<sup>159</sup> This case concerned discrimination of female American workers by their employer, a Delaware corporation, operating in Saudia Arabia. In deciding whether the Civil Rights Act of 1964 was applicable to the case, the Court concluded in the negative, relying on the presumption against extraterritoriality as a guarantee “against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>160</sup>

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<sup>154</sup> 542 U.S. 156.

<sup>155</sup> 509 U.S. 764, 820 (Scalia J).

<sup>156</sup> See, for example, *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014), affirming that the “true conflicts” approach is restricted to prescriptive comity and says nothing about adjudicatory comity (as in the case at issue), only to apply the comity considerations contained in § 403 of the Restatement, which deal with prescriptive comity too. See also *Opinio Juris* » Blog Archive The Ninth Circuit’s Muddled Comity Analysis in *Mujica* - *Opinio Juris*, , <http://opiniojuris.org/2014/11/21/ninth-circuits-muddled-comity-analysis-mujica/> (last visited Mar 13, 2016); Symeon C. Symeonides, *Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey*, 63 AM. J. COMP. LAW 299, 312 (2015).

<sup>157</sup> See, e.g., *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949).

<sup>158</sup> 499 U.S. 244 (1991).

<sup>159</sup> *Id.* at 260.

<sup>160</sup> *Id.* at 248 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10 (1963)).

More recently, the Supreme Court has employed comity to curb the territorial reach of United States law in a few interesting cases dealing with securities regulation and, most prominently, human rights.<sup>161</sup> In *Morrison v. Nat'l Austl. Bank Ltd.*,<sup>162</sup> a number of foreign investors initiated a class action against an Australian bank alleging securities fraud. In delivering the Court's opinion, Justice Scalia focused on the extraterritorial application of the Securities Exchange Act and concluded that the presumption against extraterritoriality applied "regardless of whether there is a risk of conflict between the American statute and a foreign law. When a statute gives no clear indication of an extraterritorial application, it has none."<sup>163</sup> Interestingly, discussing a statement of the Solicitor General claiming that the "significant and material conduct" test was "in accord with prevailing notions of international comity," Scalia appeared to draw the dubious inference that such an assertion of prescriptive jurisdiction, if there had been any, would not have amounted to a violation of international law.<sup>164</sup>

This remark has been criticized in American scholarship on the grounds that it blurs the line between international law and international comity, but one wonders if the assessment is not too harsh.<sup>165</sup> Indeed, the Solicitor General raised the point of conformity to comity to suggest that an intent of extraterritorial application would not have been illogical. Scalia was surely right in remarking that this was no proof that Congress had made such an assertion.<sup>166</sup> What is more, he was also formally correct in stating that such a conduct would have been in conformity to customary international law: to breach it, one must ostensibly breach comity

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<sup>161</sup> But see also *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005), where it was held — citing the *Wildenhus's Case*, 120 U. S. 1, 12 (1887) — that in dealing with foreign vessels comity only requires that "general statutes are presumed not to impose requirements that would interfere with the internal affairs of foreign-flag vessels." *Id.* at 142. However, the Court stated unambiguously that "that general statutes are presumed to apply to conduct that takes place aboard a foreign-flag vessel in United States territory if the interests of the United States or its citizens, rather than interests internal to the ship, are at stake." *Id.* at 130-131.

<sup>162</sup> 561 U.S. 247 (2010).

<sup>163</sup> *Id.* at 255.

<sup>164</sup> *Id.* at 272.

<sup>165</sup> Dodge, *supra* note 4 at 2120.

<sup>166</sup> Briggs, *supra* note 4 at 104.

first, never the other way around. Ultimately, while we will never know whether this truism was the actual purpose of Scalia's discussion of the issue, the resulting terminological confusion cannot be commended.<sup>167</sup>

Other cases concerned claims for violation of the "law of nations" under the Alien Tort Statute (ATS). The leading authority in this context is *Kiobel v. Royal Dutch Petroleum Co.*<sup>168</sup> Until a few years before the facts of the case, the ATS had been relegated as little more than a historical oddity. Passed as part of the Judiciary Act of 1789, it granted the District Courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>169</sup> The Act remained forgotten until the early eighties, when the Second Circuit rediscovered it in the landmark case *Filártiga v. Peña-Irala*,<sup>170</sup> holding that torture amounted to a breach of the law of nations and that the ATS provided federal jurisdiction.<sup>171</sup>

In *Kiobel*, Nigerian petitioners filed a suit against a number of corporations alleging that they had aided and abetted the Nigerian government in committing violations of the law of nations.<sup>172</sup> The Court of Appeals had rejected the claims, reasoning that the law of nations did not recognize corporate liability, and certiorari was eventually granted by the Supreme Court.<sup>173</sup> The case, however, was resolved on other grounds, namely that the facts of the case had taken place outside of the United States and that nothing in the ATS rebutted the presumption

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<sup>167</sup> On the questions of extraterritorial application of state law raised by *Morrison*, see Florey, *supra* note 133.

<sup>168</sup> 133 S. Ct. 1659. On the history of the ATS see Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor, The, AM. J. INT. LAW; William S. Dodge, *Historical Origins of the Alien Tort Statute: A Response to the Originalists*, The, 19 HASTINGS INTL COMP REV 221 (1995).

<sup>169</sup> 28 U.S.C.A. § 1350. On the increased reliance on custom for suits under the ATS see JAMES CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW, GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 164 (2014).

<sup>170</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>171</sup> *Id.* at 878.

<sup>172</sup> *Kiobel*, 133 S. Ct. at 1663.

<sup>173</sup> *Id.*

against extraterritoriality.<sup>174</sup> In order to do so, the Court traced the evolution of the ATS back to its historical roots<sup>175</sup> and considered the foreign policy implications of extraterritorial ATS jurisdiction in terms of interference with both other sovereign states and the executive as the sole responsible of the United States foreign policy.<sup>176</sup> In particular, the Court used the historical argument to claim that the prosecution of admittedly extraterritorial conduct such as piracy did not interfere with the preserve of other sovereigns, and the foreign policy argument to reason that haling foreign defendants in United States courts for breaches of international law occurring abroad might have provoked the undesired result of the opposite also applying.<sup>177</sup>

These conclusions seem consistent with Justice Breyer's findings in his separate opinion in *Sosa v. Alvarez-Machain*.<sup>178</sup> However, in that case the Court had limited the applicability of the ATS to violations "specific, universal, and obligatory" norms.<sup>179</sup> In his concurrence, Breyer endorsed this choice on the basis that "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery," and the fact that universal tort jurisdiction could threaten "the practical harmony that comity principles seek to protect" militated in favor of a limited number of actionable norms.<sup>180</sup> Accordingly, Breyer disagreed again with the Court's reasoning in *Kiobel*: In his view, it was wrong to decide the case on the basis of the presumption against extraterritoriality. Rather, he stated that the ATS provided jurisdiction where

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<sup>174</sup> *Id.* at 1669.

<sup>175</sup> *Id.* at 1665 ff.

<sup>176</sup> *Id.* at 1663.

<sup>177</sup> *Id.* at 1669.

<sup>178</sup> 542 U.S. 692.

<sup>179</sup> *Id.* 748.

<sup>180</sup> *Id.* 762 (2004).

(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.<sup>181</sup>

To Breyer and those who joined the minority opinion, to interpret the ATS this way would be consistent with the international law of jurisdiction and with the comity concerns of minimizing international friction.<sup>182</sup>

*Analysis:* There can no longer be any doubt that comity plays a role in limiting the territorial reach of American law, though it is nevertheless distinct from the presumption against extraterritoriality.<sup>183</sup> It is, however, clear from the above that the use of the principle to this end is not necessarily consistent.

Let us consider, for example, the *Aramco* case. As Posner and Sunstein observed, “does Saudi Arabia really care about sex discrimination by American businesses practiced against American employees? Even if it does, does it care enough that the discriminatory practice should be tolerated?”<sup>184</sup> The principle of comity, as it has been understood by American courts, does allow this type of analysis – therein lies its importance, and the reason why it was precisely comity that Justice Marshall mentioned in his dissent in *Aramco*.<sup>185</sup> And yet, it is interesting to observe that the Supreme Court has been much bolder in affirming that comity was no bar to

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<sup>181</sup> *Kiobel*, 133 S. Ct. at 1673-4.

<sup>182</sup> *Id.*

<sup>183</sup> See *In re Maxwell Commc'n Corp. plc* by Homan, 93 F.3d 1036, 1047 (2d Cir. 1996) (“Moreover, international comity is a separate notion from the “presumption against extraterritoriality,” which requires a clear expression from Congress for a statute to reach non-domestic conduct... Because the principle of comity does not limit the legislature's power and is, in the final analysis, simply a rule of construction, it has no application where Congress has indicated otherwise.”).

<sup>184</sup> Eric A Posner & Cass R Sunstein, *Chevronizing Foreign Relations Law*, YALE LAW J. 1170-1228, 1173 (2007).

<sup>185</sup> *Aramco*, 499 U.S. 244, 265 (1991). But see Briggs, *supra* note 4 at 96, maintaining that the Court applied principles descending from comity.

the exercise of extraterritorial prescriptive jurisdiction in the antitrust sphere than it has been in other significant areas, such as worker discrimination or tortious claims under the ATS.<sup>186</sup> True, such choices lie within the conceptual boundaries of the principle, but it is arguably difficult to justify a difference in treatment of anticompetitive conduct and discrimination against American nationals when both cause – to play with Huber’s words – “prejudice to the power or rights of such governments or of its subjects.” As Louise Weinberg lucidly put it “[t]his is a vivid example of how ‘comity’ can mean accommodation to values repugnant to this country.”<sup>187</sup>

Finally, the attitude of the American judiciary suggests that we spend a few words on the relationship between comity and territoriality. The two concepts have always gone hand in hand, the former being a predicate of the latter, but always in the sense that one state should allow foreign law to have extraterritorial effect in its territory unless their fundamental domestic interests militated against it.<sup>188</sup> This model coherently assumes – rather than presumes – legislation to be territorial: to state that national interests justify a greater reach of the forum’s law just because they allow limitation of foreign law is stretching the theoretical boundaries of the paradigm. To clarify, we are not claiming that presumptively limiting the reach of the forum’s law to the forum’s territory is inconsistent with comity – quite the contrary: We observe that extending it because of the importance of domestic interests does not descend naturally from the principle. If anything, the point contributes to highlight the significance of the distinction between matters of international law of jurisdiction and comity,

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<sup>186</sup> On the post-*Kiobel* landscape, see Donald Earl Childress III, *Is an International Arbitral Tribunal the Answer to the Challenges of Litigating Transnational Human Rights Cases in a Post-Kiobel World*, 19 UCLA J INTL FOREIGN AFF 31 (2015).

<sup>187</sup> Weinberg, *supra* note 20 at 74. Speaking of the *Aramco* case, Weinberg notes that its result might have been “a practical necessity, particularly at a time when hundreds of American companies are competing for contracts to rebuild Kuwait.” *Id.*

<sup>188</sup> For Huber’s original statement of the doctrine, see *supra* note 56 and accompanying text.

in that state interests are the justification of exorbitant jurisdiction and comity an incentive to its restriction.

## B. Comity and the recognition of foreign judicial acts

The doctrine of comity has for a long time provided the basis for the recognition of foreign judgments in the United States.<sup>189</sup> In this regard, Justice Gray's opinion in *Hilton v. Guyot* has undeniably represented "the lodestar for all transnational enforcement doctrines in the U.S."<sup>190</sup> The Court famously held that comity was

neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.<sup>191</sup>

The case concerned the recognition of a decision rendered in a French court. The comity analysis in the case was partly consistent with the theories of Story and the Dutch writers, predicated as it was on the idea that any such recognition should have not caused harmful effects to the United States, its citizens, or their rights, and resulted in the rule whereby if

the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are

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<sup>189</sup> A number of authorities have classified the recognition of foreign judgments under the heading of adjudicative comity. While we agree that there is merit to that view, we prefer to privilege the aspects concerning comity as a principle of recognition and treat it separately. For different views see *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) ("The doctrine of international comity can be applied retrospectively or prospectively. When applied retrospectively, domestic courts consider whether to respect the judgment of a foreign tribunal or to defer to parallel foreign proceedings"); Dodge, *supra* note 4; Childress, *supra* note 4.

<sup>190</sup> KOH, *supra* note 29 at 206.

<sup>191</sup> *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).



stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.<sup>192</sup>

The Court thus provided a principled framework for the recognition of foreign judgments. However, there is at least one more reason to hail *Hilton* as a “watershed moment in the history of international comity,”<sup>193</sup> and that of abidance to the rule of reciprocity, which the Court – perhaps reading too much in Story’s *Commentaries* – placed firmly within “the structure of international jurisprudence.”<sup>194</sup> The Court reasoned that “if the judgment had been rendered in this country, or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits.” Accordingly, arguing on the basis that “international law is founded upon mutuality and reciprocity,” “the principles of international law recognized in most civilized nations, and by the comity of our own country,” the Court held that the judgment was not entitled to full recognition.<sup>195</sup>

*Hilton*’s significance for the recognition of judgments also faded to some degree after the Supreme Court’s decisions in *Erie* and *Klaxon*. Indeed, *Hilton* has been considered in contrast to the more efficient rules of state law,<sup>196</sup> and the reciprocity rule denounced by courts more or

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<sup>192</sup> *Id.* at 205-06.

<sup>193</sup> Childress, *supra* note 4 at 31.

<sup>194</sup> *Hilton v. Guyot*, 159 U.S. 113, 227 (1895) (citing STORY, *supra* note 16 at § 618. Story only observes that the rule of reciprocity is “a very reasonable” one. *cite*

<sup>195</sup> *Hilton*, 159 U.S. at 228.

<sup>196</sup> See, e.g., *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1004 (5th Cir. 1990) (“Although comity is not a rule of law, it is more than mere courtesy and accommodation... Under the Texas Recognition Act the rules relating to the recognition of foreign country money-judgments are statutory and therefore more predictable.”).

less expressly.<sup>197</sup> In any event, even before *Erie* many American legal minds were aware of the limitations of *Hilton's* reciprocity. As early as 1925, Judge Learned Hand affirmed that

[w]hatever may be thought of that decision, the court certainly did not mean to hold that an American court was to recognize no obligations or duties arising elsewhere until it appeared that the sovereign of the locus reciprocally recognized similar obligations existing here. That doctrine I am happy to say is not a part of American jurisprudence.<sup>198</sup>

Criticism of *Hilton's* model of reciprocity was in fact quite widespread.<sup>199</sup> Perhaps the most compelling exposition of the flaws inherent a reciprocity analysis may be found in Judge Cuthbert Pound's opinion in *Johnston v. Compagnie Generale Transatlantique*<sup>200</sup>:

It is argued with some force that questions of international relations and the comity of nations are to be determined by the Supreme Court of the United States... But the question is one of private rather than public international law, of private right rather than public relations and our courts will recognize private rights acquired under foreign laws and the sufficiency of the evidence establishing such rights... Comity is not a rule of law, but it is a rule of 'practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question... It, therefore, rests, not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgment. When the whole of the facts appear to have been inquired into by the French courts, judicially, honestly

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<sup>197</sup> See, e.g., *De la Mata v. Am. Life Ins. Co.*, 771 F. Supp. 1375, 1383 (D. Del. 1991) ("[T]he court predicts that the Delaware Supreme Court would no longer regard reciprocity as a precondition for the recognition of a foreign judgment."); *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 387 (1926) ("Comity is not a rule of law, but it is a rule of 'practice, convenience and expediency... It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question.").

<sup>198</sup> *Direction der Disconto-Gesellschaft v. U.S. Steel Corp.*, 300 F. 741, 747 (S.D.N.Y. 1924).

<sup>199</sup> *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 580 (1908) ("There being, then, no provision of positive law requiring the recognition of the right of the plaintiff in error to appropriate property in the state of Wisconsin and subject it to distribution for the benefit of foreign creditors as against the demands of local creditors, how far the public policy of the state permitted such recognition was a matter for the state to determine for itself").

<sup>200</sup> 242 N.Y. 381 (1926).

and with full jurisdiction and with the intention to arrive at the right conclusion, and when they have heard the facts and come to a conclusion, it should no longer be open to the party invoking the foreign court against a resident of France to ask the American court to sit as a court of appeal from that which gave the judgment. I reach the conclusion that this court is not bound to follow the Hilton case and reverse its previous rulings.<sup>201</sup>

Be that as it may, comity has largely lost its role as ground upon which foreign judgments are recognized, at least as a common law doctrine, as the matter is now covered by Uniform Acts,<sup>202</sup> which provide more straightforward solutions. It must be observed, however, that the doctrine has not been sidestepped completely. First of all, comity played a role for the period of time in which the Acts had yet to receive a homogeneous adoption by states. In a 10<sup>th</sup> Circuit case, it was affirmed that comity governed the recognition of foreign judgments in Utah, a state that had not yet adopted the Uniform Acts.<sup>203</sup> Second, even a cursory reading of the 2005 Uniform Foreign-Country Money Judgments Recognition Act shows as much, as its “saving clause” states that does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within [its] scope.”<sup>204</sup> Third, the Acts’ focus on concepts such as “repugnancy” and their understanding by the courts is certainly revealing of their foundation in comity.<sup>205</sup> What is more, the courts have used comity as a canon of statutory construction for the Uniform Acts: In a 2013 case, the Ninth Circuit held that the act’s public policy exception did not apply “unless a foreign-country judgment or the law on which it is based is

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<sup>201</sup> *Id.* at 386-87.

<sup>202</sup> UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1962); UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (2005).

<sup>203</sup> 12 Soc’y of Lloyd’s v. Reinhart, 402 F.3d 982, 999 (10th Cir. 2005).

<sup>204</sup> *Id.* § 11.

<sup>205</sup> See *Wolff v. Wolff*, 40 Md. App. 168, 175 (1979) (“Thus the Uniform Foreign Money-Judgments Recognition Act was intended to promote principles of international comity by assuring foreign nations that their judgments would, under certain well-defined circumstances, be given recognition by courts in states which have adopted the Uniform Act... The Act, therefore delineates a Minimum of foreign judgments which Must be recognized in jurisdictions which have adopted the Act, and in no way constitutes a Maximum limitation upon foreign judgments which May be given recognition apart from the Act”). See also Marc P. Epstein, *Comity Concerns Are No Joke: Recognition of Foreign Judgments Under Dormant Foreign Affairs Preemption*, 82 FORDHAM REV 2317, 2321 (2013).

“so antagonistic to California [or federal] public policy interests as to preclude the extension of comity.”<sup>206</sup> It might be added that the Uniform Acts do not, for example, cover injunctions. Accordingly, in *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*,<sup>207</sup> the Ninth Circuit stated that “Because the Uniform Act does not cover injunctions, we look to general principles of comity followed by the California courts.”<sup>208</sup> Finally, it has been argued in at least one case that the demands of comity might be met by requiring that non-enforceable judgments be granted recognition and their enforcement being left untouched.<sup>209</sup> This is might, of course, be a meaningful result on its own – one may think of the *res judicata* effect of such a judgment – and exemplifies a conclusion that could not be reached by the reading of the Acts alone.

In conclusion, comity reasoning appears to be deeply entrenched in matters of recognition of foreign judgments and, more generally, judicial acts. In this regard, it can be observed that *Hilton*’s legacy remains uncontested authority for the view that comity constitutes the basis for the recognition of foreign judgments, filling the gaps left by and fine-tuning the more detailed regulation of the matter by state sources. Conversely, reciprocity, while sometimes invoked as “relevant factor for the granting of comity,” has failed to become an essential element of a comity analysis in this context.<sup>210</sup>

Indeed, the main problem of *Hilton*’s legacy is not connected to its definition of the doctrine,<sup>211</sup> or to its linking the concept of reciprocity to the recognition of judgments, but rather to the way its rationale has been extended to other manifestations of comity – namely,

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<sup>206</sup> *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 1002 (9th Cir. 2013) (citing *Crockford's Club Ltd. v. Si-Ahmed*, 203 Cal. App. 3d 1402, 1406 (Ct. App. 1988)).

<sup>207</sup> 433 F.3d 1199 (9th Cir. 2006).

<sup>208</sup> *Id.* at 1213.

<sup>209</sup> *Guinness PLC v. Ward*, 955 F.2d 875, 889 (4th Cir. 1992) (“[W]e nonetheless believe that such goal as well as the principles of comity are still sufficiently served by the fact that judgments which are not enforceable might still be entitled, if consistent with the Act’s criteria, to recognition.”).

<sup>210</sup> *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 460.

<sup>211</sup> As Calamita put it, *Hilton*’s definition does convey the idea that comity “stands as a short-hand term to denote a collection of identifiable interests and values that must be balanced in given cases and from which rules of law develop.” Calamita, *supra* note 24 at 626.

those concerning applicable law and management of parallel proceedings.<sup>212</sup> Some see *Hilton's* continued citation where comity is invoked as a matter of regret. Childress calls *Hilton's* treatment of the matter "woefully inadequate" because of its relinquishment of a sovereign interests rationale for reciprocity and an unsatisfactory foundation that "does not provide courts with concrete direction in applying the doctrine."<sup>213</sup> As Louise Weinberg put it, reciprocity "is simply not as safe an item as 'motherhood' or 'apple pie'."<sup>214</sup>

It is, however, not entirely true that the recognition of foreign judgments is entirely devoid of foreign relations consequences: the recent *Chevron* cases<sup>215</sup> are testament to this proposition. As it is well known, the District Court had, acting under the recognition law of the forum state, granted an injunction enjoining and restraining the plaintiffs "from directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the judgment previously rendered."<sup>216</sup> The rationale for the decision was that the judgment rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."<sup>217</sup> Vacating the injunction, the Second Circuit held that it was a "particularly weighty matter for a court in one country to declare that another country's legal system is so corrupt or unfair that its judgments are entitled to no respect from the courts of other nations."<sup>218</sup> This, if comity is to be respected, it would have been a correct conclusion even if the matter had been limited to the recognition of foreign judgment. The

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<sup>212</sup> *In re Maxwell Commc'n Corp. plc* by Homan, 93 F.3d 1036, 1046 (2d Cir. 1996) ("Although *Hilton* addressed the degree to which a foreign judgment is conclusive in a court of the United States, the principle expressed is one of broad application.").

<sup>213</sup> Childress, *supra* note 4 at 33–34; Partially against this view, see Briggs, *supra* note 4 at 145 ff.

<sup>214</sup> Weinberg, *supra* note 20 at 59.

<sup>215</sup> *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011); *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).

<sup>216</sup> *Donziger*, 768 F. Supp. 2d at 660.

<sup>217</sup> *Id.* at 636.

<sup>218</sup> *Naranjo*, 667 F.3d at 244.

Court, however, was also concerned with the implications of an injunction with such wide-ranging, global effects, as it found one such injunction to be very close to tacitly holding the courts of other countries “insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates.”<sup>219</sup> As Briggs points out, solutions to these issues are not readily available: If these questions are to be resolved on the basis of comity, possibly infringed by any such judgment of non-recognition, the answer, lacking a clear, sovereign — or international law — command overriding comity considerations, “depends, inevitably, on what comity is.”<sup>220</sup>

### C. Adjudicatory comity, or “the comity of courts”

Comity has also been invoked to justify certain approaches towards adjudication carried out in foreign countries and, to some extent, international courts and tribunals. This is an area in which the notion of “comity” falls close to the notion of “deference,” as these doctrines are clearly understood to arise not from a lack of jurisdictional power, but rather from the discretionary decision not to exercise one that exists — indeed, if it did not, no conflict would occur — for a number of reasons.<sup>221</sup> Within the debate on the modern idea of comity, the notion that the principle may provide the basis for the coordination of the exercise of adjudicatory power, or is at least implicated in it, is usually assumed as a starting point.<sup>222</sup> This role of comity, however, can hardly be taken for granted. As Campbell McLachlan observed in his 2009 Hague lectures on *Lis Pendens in International Litigation*,

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<sup>219</sup> *Id.* at 244. The Court based its reasoning on New York state law. For our purposes this distinction is immaterial. See Epstein, *supra* note 207 at 2352.

<sup>220</sup> Briggs, *supra* note 4 at 141.

<sup>221</sup> This, of course, does not exclude the possibility that in some cases “the exercise of apparently discretionary rules could mask an underlying objective of compliance with international limitations on judicial authority”. See Alex Mills, *Rethinking Jurisdiction in International Law*, BR. YEARB. INT. LAW bru003, 6 (2014).

<sup>222</sup> Calamita, *supra* note 24 at 614.

the early Dutch fathers of the Conflict of Laws did not, proceed to consider the application of *lis pendens* to the problem of the conflict of litigation internationally.... cases of this kind did not begin to tax the English courts until the nineteenth century. In any event, the application of the doctrine of *lis pendens* in the form in which Huber and Voet recognized it would have required a much stronger form of comity than they had otherwise accepted for the effects of foreign legal systems. It was not merely a matter of courts giving effect to foreign law and foreign judgments. Rather, it would have required the court to cede the power of adjudication to a foreign court.<sup>223</sup>

This latter problem has traditionally represented the most significant hurdle: Indeed, it is one thing to accept that *acts* issued by a foreign court must be entitled to recognition insofar as they accord with the fundamental policies of forum state; to concede that the same respect should be granted to mere *proceedings* might sound to some as crossing the Rubicon of judicial abdication. To be sure, adjudicative comity encompasses a wide range of hypotheses and not all of them call for the same reactions. Dismissing local proceedings when none are pending before a foreign court is not the same as doing so when they have been instituted and a clash is inevitable. Different yet is the case of anti-suit injunctions issued for the purposes of frustrating the effects of potential or actual foreign parallel proceedings. As Briggs observed, these cases do not have the same implications for comity.<sup>224</sup> Yet, comity does have a role to play in all of them. According to William Dodge, it does so by informing doctrines of abstention “deferring to foreign courts by restraining the exercise of U.S. courts’ jurisdiction.”<sup>225</sup>

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<sup>223</sup> MCLACHLAN, *supra* note 62 at 223.

<sup>224</sup> Briggs, *supra* note 4 at 116 ff.

<sup>225</sup> Dodge, *supra* note 4 at 2216.

1. *The origins of adjudicatory comity in admiralty courts and the use of forum non conveniens*

Before the Supreme Court's decision in *International Shoe Co. v. Washington*,<sup>226</sup> the jurisdiction of American Courts was understood to be strictly territorial. On the other hand, the jurisdiction of admiralty courts was without limitations. This was by design as the interests of justice so demanded in many cases, most importantly in those brought by seamen for their wages or injuries suffered during employment.<sup>227</sup> And yet, taking jurisdiction in such cases often meant holding a ship in an American port, an action liable to be perceived as an unjustified interference by the flag state.<sup>228</sup> In this regard, a choice to decline jurisdiction echoed comity concerns. As one early case put it,

upon the one hand the courts are not without ample power to hear and determine such suits, when the circumstances of the case before them seem to render it fit that they should do so; while, upon the other hand, they are not bound to do this, but will, in general, from motives of international comity, of delicacy, and of convenience, decline the suit.<sup>229</sup>

One way the courts addressed this problem was through the doctrine of *forum non conveniens*.<sup>230</sup> *Forum non conveniens* is a common law doctrine which results in the “discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere.”<sup>231</sup> The “plea” of *forum non conveniens*

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<sup>226</sup> 326 U.S. 310 (1945).

<sup>227</sup> Alexander M. Bickel, *Doctrine of Forum Non Conveniens As Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL LAW Q. 12, 19 (1949).

<sup>228</sup> *Id.* at 21.

<sup>229</sup> *Davis v. Leslie*, 7 F. Cas. 134, 137 (S.D.N.Y. 1848).

<sup>230</sup> *Am. Dredging Co. v. Miller*, 510 U.S. 443, 464 (1994) (Kennedy and Thomas Js dissenting) (“From the beginning, American admiralty courts have confronted this problem through the *forum non conveniens* doctrine.”).

<sup>231</sup> Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUMBIA LAW REV. 1-34, 1 (1929).



probably originated in Scotland<sup>232</sup> and was further developed in English courts.<sup>233</sup> The doctrine, however, is largely unknown to civil law systems, though it might – after having suffered a significant blow<sup>234</sup> – be in the process of being rediscovered under the Recast Brussels Regulation.<sup>235</sup>

While the relationship between comity and *forum non conveniens* is generally complex throughout the common law tradition,<sup>236</sup> it is particularly so in the American context: As early as 1929, Paxton Blair wrote that while it was “a principle of exceptions to the doctrine of comity,”<sup>237</sup> employing *forum non conveniens* in a particular case “does not involve ignoring the requirements of comity; on the contrary in some cases only by doing so can the requirements of comity be met.”<sup>238</sup> The argument has also been made that the doctrine does not fully accord with comity: on the one hand, a decision to dismiss local proceedings in favor of a different forum entails an evaluation of the comparative suitability of a foreign court<sup>239</sup>; on the other hand, if the proceedings before the foreign court have not already been initiated, a decision by

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<sup>232</sup> The Atlantic Star *Atlantic Star (Owners) v. Bona Spes (Owner)* [1974] A.C. 436 (per Lord Reid) (“The appellants’ counsel first referred to the law of Scotland, where for a very long time the plea of *forum non conveniens* has been recognised as valid. No doubt it is a desirable objective to diminish remaining differences between the laws of the sister countries.”). See also Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOYOLA LOS ANGEL. INT. COMP. LAW J. 455, 459 (1993).

<sup>233</sup> See, in particular, *The Abidin Daver* [1984] 1 AC 398; *Spiliada Maritime Corp’n v Cansulex Ltd* [1987] AC 460.

<sup>234</sup> Case C-281/02 *Owusu v Jackson (t/a Villa Holidays bal-Inn Villas)*, 2005 ECR, I-01383, holding that “[t]he Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-contracting State would be a more appropriate forum for the trial of an action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other contracting State.” On this issue see Barry J. Rodger, *Forum non conveniens post-Owusu*, 2 J. PRIV. INT. LAW 71–97 (2006).

<sup>235</sup> See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 351, 20.12.2012, p. 1–32, articles 33 and 34.

<sup>236</sup> For an analysis of the relationship between comity and *forum non conveniens* in English law, see Thomas Schultz & Jason Mitchenson, *Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts*, FORTHCOMING.

<sup>237</sup> Blair, *supra* note 233 at 33.

<sup>238</sup> *Id.* at 6.

<sup>239</sup> This aspect has implications of a certain magnitude in international adjudication, where it might be considered in tension with the principle of *Kompetenz-Kompetenz* – that is, the principle that a tribunal is capable of adjudicating on its own jurisdiction. See Schultz and Ridi, *supra* note 6; MCLACHLAN, *supra* note 62 at 454.

the local court not to exercise jurisdiction may amount to “dumping” cases — that is, telling another court what to do.<sup>240</sup>

Indeed, while after *International Shoe* American courts swiftly understood the significance of the doctrine, the Supreme Court did not link *forum non conveniens* and comity in its first decisions on the matter, though it must be noted that the Court’s main concern was to overcome the constitutional hurdles to its application. In *Gulf Oil Corp. v. Gilbert*,<sup>241</sup> the Court did not play down the constitutional duty to exercise jurisdiction; rather, it held that “[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.”<sup>242</sup> By the same token, comity remained, with few exceptions, notably absent from the Supreme Court’s discussion of the doctrine for a long time, with very few timid mentions as exceptions.<sup>243</sup>

If lower courts have more often considered the two concepts together, they have largely done so for the purpose of distinguishing one from the other in the most ambiguous cases. In *Laker*, the D.C. Circuit observed that the interest supporting the grant of anti-suit injunctions enjoining the parties from commencing proceedings abroad were to be balanced with comity principles requiring respect for the judicial function of the foreign court.<sup>244</sup> Accordingly, the avoidance of “hardship to parties” and the promotion of “economies of consolidated

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<sup>240</sup> Briggs, *supra* note 4 at 119.

<sup>241</sup> 330 U.S. 501 (1947).

<sup>242</sup> *Id.* at 507. According to Calamita, this conclusion followed from the contention that congressional grants of jurisdiction are to be read on the background of the common law, which allow for such discretion. See Calamita, *supra* note 24 at 638. See also *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1433 (2012) (“[A]bstention accommodates considerations inherent in the separation of powers and the limitations envisioned by Article III, which conferred authority to federal courts against a common-law backdrop that recognized the propriety of abstention in exceptional cases.”).

<sup>243</sup> *Am. Dredging Co. v. Miller*, 510 U.S. 443, 467 (1994) (Kennedy and Thomas Js dissenting); *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422 (2007); *Daimler AG v. Bauman*, 134 S. Ct. 746, 771 (2014) (Sotomayor J concurring).

<sup>244</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, at 928 (D.C. Cir. 1984).

litigation” would have been better pursued by a motion for dismissal on grounds of *forum non conveniens*. In other cases, comity and *forum non conveniens* have been discussed together, but stressing that they were considered as alternative grounds for dismissal of the same suit.<sup>245</sup> However, connection between the two is drawn insofar as the procedural necessity of showing that an alternative and suitable forum exists might be imposed by the circumstance that a court is precluded by comity from passing judgment on a foreign court.<sup>246</sup>

Yet, *forum non conveniens* is regarded as much narrower a ground for dismissal than comity. As the Second Circuit put it in *Norex Petroleum Ltd. v. Access Indus., Inc.*,

[i]t may well be that a plaintiff that is precluded from litigating a matter in a foreign jurisdiction because of an adverse earlier judgment by its courts will not be able to pursue the claim further in the United States, but the reason for dismissal in such circumstances is our recognition of the foreign judgment in the interest of international comity, not *forum non conveniens*.<sup>247</sup>

Most importantly – and this truly is the core of the problem – *forum non conveniens* may be considered much narrower than comity because its focus on sovereign interests is less significant. True, it can be argued that it is comity is the basis of the recognition of the “local interest in having localized controversies decided at home.”<sup>248</sup> Further, one fails to see how any such distinction could be understood from the phrasing of Scalia’s famous dissent in *Hartford Fire*, which defined the “comity of courts” as declining “to exercise jurisdiction over matters *more appropriately adjudged elsewhere*”.<sup>249</sup> It must, however, be observed that comity analysis,

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<sup>245</sup> *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, at 951 (11th Cir. 1997).

<sup>246</sup> *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009) (“The defendant bears the burden of establishing that a presently available and adequate alternative forum exists, and that the balance of private and public interest factors tilts heavily in favor of the alternative forum... Absent a showing of inadequacy by a plaintiff, “considerations of comity preclude a court from adversely judging the quality of a foreign justice system.”).

<sup>247</sup> *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, at 159 (2d Cir. 2005).

<sup>248</sup> *Gulf Oil Corp. v. Gilbert Storage & Transfer Co.*, 330 U.S. 501, 509 (1947). See also Anne-Marie Slaughter, *Judicial globalization*, 40 VA J INTL L 1103, 1113 (1999).

<sup>249</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (emphasis added).

while sometimes recognized as “ultimately intertwined with the *forum non conveniens* calculus,”<sup>250</sup> is generally regarded by the courts as separate.<sup>251</sup>

## 2. *Comity as a coordination device for pending or potential parallel proceedings*

While “[c]oncurrent jurisdiction does not necessarily entail conflicting jurisdiction,”<sup>252</sup> differences and tensions do arise from parallel adjudication of the same or similar disputes in different countries. Comity has served as a powerful tool to resolve this problem by providing exceptions to the “virtually unflagging obligation” of American Courts to exercise their jurisdiction.<sup>253</sup>

This is particularly common in bankruptcy cases. As the Second Circuit put it in *Cunard S.S. Co. v. Salen Reefer Servs. AB*,<sup>254</sup> this promoted efficiency insofar as

[t]he granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities.<sup>255</sup>

The grant of comity, however, was not automatic, but subject to certain conditions. In *Allstate Life Ins. Co. v. Linter Grp. Ltd.*,<sup>256</sup> the same Court set out a number of factors as “indicia of procedural fairness,” including

- (1) whether creditors of the same class are treated equally in the distribution of assets; (2)
- whether the liquidators are considered fiduciaries and are held accountable to the court; (3)

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<sup>250</sup> Ford v. Brown, 319 F.3d 1302, 1304 (11th Cir. 2003).

<sup>251</sup> But see Dodge, *supra* note 4 at 2209–10 “Because the doctrine of *forum non conveniens* allows U.S. courts to restrain their exercise of jurisdiction in deference to foreign courts, it is properly considered a doctrine of international comity.”)

<sup>252</sup> Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984)

<sup>253</sup> Colorado River Water Conser. Dist. v. United States, 424 U.S. 800, 817 (1976).

<sup>254</sup> Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, at 458 (2d Cir. 1985).

<sup>255</sup> *Id.* at 458.

<sup>256</sup> 994 F.2d 996 (2d Cir. 1993).

whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to the debtors' potential claimants; (5) whether there are provisions for creditors' meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.<sup>257</sup>

As the same Court held years later, comity is thus afforded “to foreign bankruptcies only if those proceedings do not violate the laws or public policy of the United States.”<sup>258</sup>

These conclusions reflect an understanding of comity which is largely derived from *Hilton*. It follows that the same logic governing the recognition of judgments applies, to a significant extent, to the question of deference to foreign proceedings. Outside of the bankruptcy context, the Eleventh Circuit openly admitted as much in *Turner Entm't Co. v. Degeto Film GmbH*,<sup>259</sup> eventually concluding that comity concerns included

(1) whether the judgment was rendered via fraud... (2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence, see *id.*; and (3) whether the foreign judgment is prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just.<sup>260</sup>

Interestingly, however, the Court went further, adding that “the relative strengths” of the two countries’ interests were also relevant to the comity analysis: In the case at issue, the Court relied on this point to conclude that Germany had a greater interest to the determination of the dispute.<sup>261</sup> Complications may, of course, arise. For example, in *Jota v. Texaco, Inc.*<sup>262</sup> the

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<sup>257</sup> *Id.* at 999.

<sup>258</sup> *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999).

<sup>259</sup> *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512 (11th Cir. 1994).

<sup>260</sup> *Id.* at 1519.

<sup>261</sup> *Id.* at 1521. (“There appears to be no clear federal interest in trying this case. Certainly much is at stake in this litigation for both parties. However, the public interest in the litigation is more conspicuous in Germany.”).

Second Circuit dealt with a shift in the position of the other sovereign party involved, Ecuador, which first opposed and then advocated for the jurisdiction of United States courts.<sup>263</sup>

The existence of governmental interests is considered vital for the purposes of comity-based abstention. In *Royal & Sun All. Ins. Co. of Canada v. Century Int'l Arms, Inc.*<sup>264</sup> it was held that

[c]ircumstances that routinely exist in connection with parallel litigation cannot reasonably be considered exceptional circumstances, and therefore the mere existence of an adequate parallel action, by itself, does not justify the dismissal of a case on grounds of international comity abstention. Rather, additional circumstances must be present—such as a foreign nation's interest in uniform bankruptcy proceedings—that outweigh the district court's general obligation to exercise its jurisdiction.<sup>265</sup>

The Court reached its conclusion by reference to the Supreme Court's dictum that “[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.”<sup>266</sup> Yet, even the circuits that do not follow this approach adopt a similar methodology when confronted with parallel proceedings pending abroad. For example, in *Ungaro-Benages v. Dresdner Bank AG*,<sup>267</sup> the Eleventh Circuit drew a line between the situations where the application of the comity doctrine has a “retrospective” character and those in which it is “prospective”:

When applied retrospectively, domestic courts consider whether to respect the judgment of a foreign tribunal or to defer to parallel foreign proceedings... When applied prospectively,

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Comity may also explain the reasoning in *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582 (2d Cir.1993) (recognizing the Indian Government's interest, reflected in its domestic legislation, to be the only entity with standing to sue).

<sup>262</sup> 157 F.3d 153 (2d Cir. 1998).

<sup>263</sup> *Id.* at 160.

<sup>264</sup> 466 F.3d 88 (2d Cir. 2006).

<sup>265</sup> *Id.* at 95.

<sup>266</sup> *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). See Dodge, *supra* note 4 at 2112.

<sup>267</sup> 379 F.3d 1227 (11th Cir. 2004).

domestic courts consider whether to dismiss or stay a domestic action based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum... Applied prospectively, federal courts evaluate several factors, including the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum.<sup>268</sup>

Accordingly, a “retrospective” approach is warranted when proceedings are already pending before another forum. It is only before proceedings are initiated that a “prospective” approach may apply. *Ungaro-Benages* concerned a suit by a descendant of the heir to a German company against German banks that, the plaintiff claimed, had stolen the stock belonging to Jewish heirs in aryanization processes. In 2000, President Clinton entered into an agreement with Germany to establish a foundation to hear claims from victims of the Nazi regime. The Eleventh Circuit found that the United States’ support for the Foundation as the exclusive forum for such claims, along with the German government’s interests “in having the Foundation be the exclusive forum for these claims in its efforts to achieve lasting legal peace with the international community,” and the adequacy of the Foundation as a forum all supported dismissal.<sup>269</sup>

In some cases, the very act of adjudication of a dispute might be regarded, in and by itself, as extremely unfriendly act. Indeed, “extreme cases might be imagined where a foreign sovereign's interests were so legitimately affronted by the conduct of litigation in a United

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<sup>268</sup> *Id.* at 1238.

<sup>269</sup> *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1239 (11th Cir. 2004). For a case in which the see *Ungaro-Benages* standard was not satisfied, see *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1032 (11th Cir. 2014). A similar standard has been adopted, though perhaps not fully understood, in the Fifth Circuit decision *Perforaciones Exploracion Y Produccion v. Maritimas Mexicanas, S.A. de C.V.*, 356 F. App'x 675, 681 (5th Cir. 2009) (“Dismissal of a suit on international comity grounds may sometimes be appropriate when there is litigation pending in a foreign forum or, even absent such litigation, when allowing a case to proceed in the United States would intrude on the interests of a foreign government.”). The Third Circuit has remained skeptical of “prospective comity” analyses. See *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006) (“Absent true conflicts, a judgment from a foreign court, or parallel proceedings in a foreign forum, rarely have United States courts abstained from deciding the merits of a case on international comity grounds.”).

States forum that dismissal is warranted without regard to the defendant's amenability to suit in an adequate foreign forum.”<sup>270</sup>

These might be cases in which a court is concerned about the far reaching effects of entertaining a suit with foreign relations implications. All the same, such implications might have to be balanced with the policies of the forum state. *Bigio v. Coca-Cola Co.*,<sup>271</sup> a Second Circuit case, concerned Canadian citizens who alleged that the unlawful expropriation of their Egyptian corporation by the Egyptian government was carried out because of their Jewish lineage. The corporation was later acquired by a Delaware company, which the plaintiffs proceeded to sue on the grounds that it had done so in full knowledge of the unlawfulness of the expropriation.<sup>272</sup> The Court responded to a plea of dismissal on grounds of comity that “the only issue of international comity properly raised here is whether adjudication of this case by a United States court would offend ‘amicable working relationships’ with Egypt.”<sup>273</sup> In the case at issue, the Court could hold that comity did not justify dismissing the local proceedings by reference to the fact that the Egyptian Government had “never raised the slightest objection to adjudication of the instant controversy by United States courts” and its prior determination that “resolution of this case by United States courts will “not likely impact on international relations.”<sup>274</sup>

However, a different situation was faced in *Khulumani v. Barclay Nat. Bank Ltd.*,<sup>275</sup> a suit brought under the Alien Tort Statute by South African plaintiffs claiming that the defendants had “actively and willingly collaborated with the government of South Africa in maintaining

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<sup>270</sup> *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998).

<sup>271</sup> 448 F.3d 176 (2d Cir. 2006).

<sup>272</sup> *Id.* 178.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> 504 F.3d 254 (2d Cir. 2007).



the apartheid regime.<sup>276</sup> The case was an extremely political one, with statement of interests by the government of both countries involved.<sup>277</sup> Without delving into the complicated history of the case,<sup>278</sup> the case is notable because the District Court eventually held on remand that “[i]nternational comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction.”<sup>279</sup> The Court further held that even if there was a “true conflict,”

the decision whether to dismiss on comity grounds depends on the degree of legitimate offense to the foreign sovereign, steps the foreign sovereign may have taken to address the issues in the litigation, and the extent of the United States' interest in the underlying issues.<sup>280</sup>

The Court further observed that

[t]he absence of conflict between this litigation and the TRC process is fatal to the argument that international comity requires dismissal. The TRC process was not exclusive—by its terms, only upon a grant of amnesty was the right of “victims and/or their families to institute criminal and/or civil proceedings... Plaintiffs have now come to this Court to exercise their rights. Defendants do not argue—and South Africa has not claimed—that “an adequate forum exists in the objecting nation”... Nor does this litigation conflict with the *goals* of the TRC process; thus it is not an “extreme case” requiring dismissal even without the existence of an alternative forum for the plaintiffs’ claims.<sup>281</sup>

The problem with this reasoning is evident: As Childress has observed, it was not quite clear from *Hartford Fire* that a true conflict analysis should guide adjudicatory comity cases.<sup>282</sup>

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<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 259.

<sup>278</sup> On this topic, see Childress, *supra* note 4 at 53 ff.

<sup>279</sup> *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 283 (S.D.N.Y. 2009).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 285-86.

<sup>282</sup> Childress, *supra* note 4 at 55.

Even if it did, it is arguable that it should focus on a conflict between sovereign — something that a *Hartford Fire* type of reasoning does not seem to allow.

This point was precisely one of the most critical issues of the recent Ninth Circuit decision in *Mujica v. AirScan Inc.*,<sup>283</sup> hailed by many as a missed opportunity that contributed to further confusion on the issue. This too was an action brought under the Alien Tort Statute and the Torture Victim Prevention Act, this time by Colombian nationals against an American corporation and its private security firm, for the defendants' alleged complicity in the bombings of their village.<sup>284</sup> No other proceedings were pending elsewhere and the Court relied on adjudicatory comity to dismiss the claims, and engaged in a thorough review of the relevant case law to determine whether the doctrine was applicable and what the best standard should be.<sup>285</sup> The Court concluded — by any measure, correctly — that “*Hartford Fire* does not require proof of a “true conflict” as a prerequisite for invoking the doctrine of comity, at least in a case involving adjudicatory comity”.<sup>286</sup> It reached this conclusion by reading a number of precedents to this effect,<sup>287</sup> and ultimately expanded the Eleventh Circuit's test developed in *Ungaro-Benages* to formulate its own. In particular, where the latter test focused on “the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum,”<sup>288</sup> the Court in *Mujica* attempted to clarify the first element with the prescriptive comity factors the same Court had considered in *Timberlane*, and which made their way into § 403 of the Restatement. The Court held that they constituted “a general list of indicia to which we may look when weighing U.S. and foreign interests and the

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<sup>283</sup> 771 F.3d 580.

<sup>284</sup> *Id.* at 584.

<sup>285</sup> *Id.* at 597-599.

<sup>286</sup> *Id.* at 600.

<sup>287</sup> *Id.* at 600-01.

<sup>288</sup> *Id.* at 1238.

adequacy of the alternative forum.”<sup>289</sup> This choice has been harshly criticized, and it has been observed that such an analysis seems to be the result of a misunderstanding.<sup>290</sup> Yet, a second look reveals that the most important component of the Court’s comity analysis might have been the deference granted to the Executive’s Statement of Interest, thus seriously downplaying the significance of the other elements in the picture.<sup>291</sup>

### 3. *Anti-suit injunctions*

Finally, a few words must be spent on the topic of anti-suit injunctions. These may be considered the flipside of *forum non conveniens* and comity-based abstention doctrines insofar as their need arises when a court does not dismiss the local suit in favor of foreign proceedings. Contrary to the English tradition, where “[i]t is easy to take anti-suit injunctions for granted,” American Courts have on the whole granted the remedy sparingly.<sup>292</sup> That federal courts have the power to grant them is not at all controversial.<sup>293</sup> It has long been recognized, however, that “the power to enjoin a party before it from pursuing litigation before a foreign tribunal... often effectively restricts the jurisdiction of the foreign tribunal and should therefore be used sparingly.”<sup>294</sup>

Indeed, the grant of an anti-suit injunction can be a delicate matter: While English courts and writers often justify their existence with the need to enforce an agreement not to bring proceedings before a foreign court, there is good evidence for the proposition that the remedy

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<sup>289</sup> *Mujica v. AirScan Inc.*, 771 F.3d 580, 605.

<sup>290</sup> See William Dodge, *International Comity Running Amok*, Just Security (Feb. 3, 2015 at 9:22 AM), <https://www.justsecurity.org/19640/international-comity-run-amok/>; Roger Alford, *The Ninth Circuit’s Muddled Comity Analysis in Mujica*, *Opinio Juris* (Nov. 21st, 2014 - 1:40 PM) <http://opiniojuris.org/2014/11/21/ninth-circuits-muddled-comity-analysis-mujica/>.

<sup>291</sup> *Id.* at 610 (“Accordingly, we “give serious weight to the Executive Branch’s view of [this] case’s impact on foreign policy,” and we conclude that the United States’ interest in having the case adjudicated exclusively in Colombia is strong.”). The Court cited *Sosa v. Alvarez-Machain*, 542 U.S. at 733 (2004).

<sup>292</sup> Richard Fentiman, *Anti-Suit Injunctions – Comity Redux?*, 71 CAMB. LAW J. 273–276, 273 (2012).

<sup>293</sup> See, e.g., *Seattle Totems Hockey Club, Inc. v. Nat’l Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981) (“A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country.”).

<sup>294</sup> *United States v. Davis*, 767 F.2d 1025, 1038 (2d Cir. 1985).

does interfere with the sovereign act of adjudication – though the extent to which it does, depending on whether a foreign court has or has not been seized at the time of the injunction, might be a matter of degrees.<sup>295</sup> American Courts, on the other hand, are generally more mindful of the implications of any such gesture. As early as 1849, the Supreme Court held in *Peck v. Jenness*<sup>296</sup> that “[t]he fact... that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.”<sup>297</sup> In other words, courts granting such injunctions too liberally would raise serious comity concerns.<sup>298</sup>

This conclusion reflects the belief that “[c]oncurrent jurisdiction does not necessarily entail conflicting jurisdiction” – a statement that holds true with reference to both jurisdiction to prescribe and to adjudicate.<sup>299</sup> Accordingly, concurrent proceedings represent the rule, and, since “they are ordinarily tolerable, the initiation before a foreign court of a suit concerning the same parties and issues as a suit already pending in a United States court does not, without more, justify enjoining a party from proceeding in the foreign forum.”<sup>300</sup> In other words, parallel proceedings normally represent a necessary condition for the grant of the remedy, but seldom suffice alone, even when their concurrence might produce an “embarrassing race to judgment” and “potentially inconsistent adjudications.”<sup>301</sup> Indeed, comity considerations militating against the grant of anti-suit injunctions are no minor hurdle: The Sixth Circuit

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<sup>295</sup> Briggs, *supra* note 4 at 125–6.

<sup>296</sup> 48 U.S. 612 (1849).

<sup>297</sup> *Id.* at 625.

<sup>298</sup> *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987) (“The fact that the injunction operates only against the parties, and not directly against the foreign court, does not eliminate the need for due regard to principles of international comity.”).

<sup>299</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984).

<sup>300</sup> *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987).

<sup>301</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928 (D.C. Cir. 1984).

referred to the issuance of such an order as “a drastic step.”<sup>302</sup> The First Circuit, too, held as much in the often-cited decision in *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*,<sup>303</sup> where it held that “considerations of international comity must be given substantial weight — and those considerations ordinarily establish a rebuttable presumption against the issuance of an order that has the effect of halting foreign judicial proceedings.”<sup>304</sup>

To some extent, the grant of anti-suit injunctions tends to follow the same logic of the recognition of judgments and, even more closely, comity-driven abstention doctrines.<sup>305</sup> While conceding that no hard and fast rules were available, the D.C. Circuit observed that

[t]he equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether, in light of the principles outlined above, the injunction is required to prevent an irreparable miscarriage of justice. Injunctions are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum.<sup>306</sup>

Over the years, the Ninth Circuit has elaborated a more principled — and seemingly less conservative<sup>307</sup> — approach to anti-suit injunctions, based on a three-pronged test, which the court described in full in the 2012 case *Microsoft Corp. v. Motorola, Inc.*<sup>308</sup> First, the court must consider whether the parties and the issues are the same and “whether or not the first action is dispositive of the action to be enjoined.” Second, the court must determine whether the foreign litigation would

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<sup>302</sup> *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992).

<sup>303</sup> 361 F.3d 11 (1st Cir. 2004).

<sup>304</sup> *Id.* at 14.

<sup>305</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 931 (D.C. Cir. 1984) (“This principle is similar to the rule that a foreign judgment not entitled to full faith and credit under the Constitution will not be enforced within the United States when contrary to the crucial public policies of the forum.”).

<sup>306</sup> *Id.* at 927 (D.C. Cir. 1984). Compare with

<sup>307</sup> *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 359 (8th Cir. 2007).

<sup>308</sup> 696 F.3d 872 (9th Cir. 2012). *See also* *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2006).

(1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's *in rem* or quasi *in rem* jurisdiction; or (4) where the proceedings prejudice other equitable considerations.<sup>309</sup>

Finally, the court must assess whether the injunction's "impact on comity is tolerable."<sup>310</sup> In this regard, the Court reasoned that there are significant differences between cases where the enforcement of a choice of forum agreement is sought – unlikely, in principle, to infringe comity – and those politically sensitive situations in which foreign relations implications are expected, and perhaps even an object of a governmental statement of interest.<sup>311</sup> For those cases situated at neither end of the spectrum, the comity analysis may take into account other elements, such as whether the plaintiff initiated the foreign suit at a later moment for seemingly abusive purposes.<sup>312</sup>

Irrespective of the differences between circuits, it is easy to understand how the doctrine of comity governs the grant of anti-suit injunctions. In broad terms, the two main grounds to grant them are the protection of a court's own jurisdiction and the prevention of abusive forum selection designed to escape fundamental American policies. The first ground explains the more relaxed attitude in granting the remedy for *in rem* or quasi-*in rem* actions. As it was held in a Sixth Circuit case,

"[w]here jurisdiction is based on the presence of property within the court's jurisdictional boundaries, a concurrent proceeding in a foreign jurisdiction poses the danger that the foreign

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<sup>309</sup> These are commonly referred to as the "Unterweser factors." See *In re Unterweser Reederei GmbH*, 428 F.2d 888, 896 (5th Cir.1970).

<sup>310</sup> *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012).

<sup>311</sup> *Id.* at 887.

<sup>312</sup> *Id.*

court will order the transfer of the property out of the jurisdictional boundaries of the first court, thus depriving it of jurisdiction over the matter”.<sup>313</sup>

The second is a public policy ground, and in that it does not differ much from the phenomenon of recognition of foreign judgments. The latter, as the D.C. Circuit put it in *Laker*, is a strict standard, but that governing anti-suit injunctions is even stricter in recognition of the much greater inference with the judicial process of another country.<sup>314</sup> An evasion of public policy warranting the remedy cannot thus be found in “the availability of slight advantages in the substantive or procedural law,”<sup>315</sup> such as, for example, the unavailability of a treble damages remedy.<sup>316</sup> Interestingly, courts instead grant anti-suit injunctions because they frustrate a United States policy favoring forum selection clauses<sup>317</sup> and “the liberal enforcement of arbitration clauses.”<sup>318</sup>

#### D. “Executive” or “sovereign-party” comity

There is one more type of comity, which has traditionally been assigned the confusing label of “executive.”<sup>319</sup> The adjective has been employed to convey the idea that this type of comity is intended to command deference “with regard to the executive acts of foreign countries,”<sup>320</sup> and

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<sup>313</sup> *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1356 (6th Cir. 1992).

<sup>314</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 931-32 (D.C. Cir. 1984).

<sup>315</sup> *Laker Airways Ltd.*, 731 F.2d at 932.

<sup>316</sup> *Gau Shan Co.*, 956 F.2d at 1358.

<sup>317</sup> *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 993 (9th Cir. 2006) (“We hold that Andina’s pursuit of litigation in Ecuador, in violation of the forum selection clause, frustrates a policy of the United States courts.”).

<sup>318</sup> *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004). The opinion cites *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985), holding that “[c]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause in question, even assuming that a contrary result would be forthcoming in a domestic context.”

<sup>319</sup> See for example Childress, *supra* note 4 at 47; Molly Warner Lien, *Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, *The*, 50 CATH UL REV 591, 595 (2000).

<sup>320</sup> Ramsey, *supra* note 13 at 937.

usually identifies the Act of State doctrine, foreign sovereign immunity and the privilege of foreign governments to bring suit in United States courts. Whether the expression achieves its objective is, however, doubtful at best: In fact, this terminology adds to the confusion stemming from the likely involvement of the Executive Branch in the cross-border affairs that normally justify the use of such types of comity. To avert the problem, William Dodge has proposed the alternative definition of “sovereign party” comity, meant to identify those cases where deference is given to foreign governments as litigants.<sup>321</sup> This choice too is problematic, as it comes with the corollary of not covering the Act of State doctrine, which Dodge classifies as a principle of recognition under the heading of prescriptive comity.<sup>322</sup>

For our purposes, the distinction is not of disproportionate consequence. Accordingly, we acknowledge the difficulty in capturing the essence of these doctrines and adopt, for reasons of intelligibility, the traditional approach of grouping the three of them together under the same heading.

### *1. The Act of State Doctrine*

The “Act of Act of doctrine” requires American courts not to question the validity of an act concluded by a foreign government in its territory. For greater precision, as the Court put it in *First National City Bank v. Banco Nacional de Cuba*, “the doctrine precludes any review whatever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State.”<sup>323</sup> The classical statement of the doctrine is generally understood to be contained in the 1897 decision *Underhill v. Hernandez*, where the Supreme Court affirmed that

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<sup>321</sup> Dodge, *supra* note 4 at 2099.

<sup>322</sup> *Id.* at 2079.

<sup>323</sup> *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763.



[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>324</sup>

The doctrine has traditionally been considered to stem from considerations of international comity, and justifiably so. As the Supreme Court put it, “[t]o permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.”<sup>325</sup> But what does comity require in this context? The answer is not as straightforward as is sometimes argued.

It has been suggested that the interests to be protected by the doctrine have changed, moving from mutual convenience, to respect for sovereignty, and, finally, consideration for the foreign relations interests of the United States and prerogatives of the political branches.<sup>326</sup> The foreign relations element of the doctrine is particularly evident in *Banco Nacional de Cuba v. Sabbatino*, where the Court considered a dispute arising from an expropriation by the Cuban government to the detriment of an American company, made all the more interesting by the circumstance that the suit was brought by the former.<sup>327</sup> The defendant had argued that this element, along with the fact that the expropriation was to be considered unlawful under international law, would have rendered the doctrine inapplicable to the case.<sup>328</sup> The Court, however, held otherwise, stating that

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<sup>324</sup> 168 U.S. 250, 252 (1897).

<sup>325</sup> *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918).

<sup>326</sup> DODGE, *supra* note 31; Paul, *supra* note 11 at 31.

<sup>327</sup> 376 U.S. 398.

<sup>328</sup> Indeed, this hypothesis is now covered by the Foreign Assistance Act of 1964 (amended 2000) (28 U.S. Code § 1605), which excludes the application of the act of state doctrine for declining jurisdiction over confiscations of property violating international law after January 1, 1959.

[t]he doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.<sup>329</sup>

In this context, comity serves as the basis of the rule.<sup>330</sup> This respect for other sovereign entities, though, is not just a textbook definition of comity itself, but rather a consequence of precise policy determinations. It is precisely in this way that courts begin to pay deference, rather than to the acts of a foreign state as such, to these policy concerns and to the branch of government best suited to pursue them: the Executive.<sup>331</sup> The Court expanded on these conclusions twice. In *First National City Bank*, it confirmed that the act of state doctrine, much like sovereign immunity,<sup>332</sup> was “judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government.”<sup>333</sup> The corollary of this statement was that the doctrine was not meant to be “inflexible,” but rather as malleable as the needs of the executive required. In the case at issue, the Executive Branch had “expressly stated that an inflexible application of the act of state doctrine by this Court would

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<sup>329</sup> 376 U.S. 398, 423.

<sup>330</sup> Though, according to Ramsay, “the fact that conflict with foreign territorial acts carries strong foreign policy implications so that in the U.S. system courts presume that such decisions lie with the so-called political branches. However, it adds little to import the label ‘comity’ into the discourse of the act of state doctrine, which can be described and explained without it.” Ramsey, *supra* note 13 at 916.

<sup>331</sup> See *Sabbatino*, 376 U.S. 398, 423 (“The act of state doctrine does, however, have ‘constitutional’ underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations.”) According to Paul, the Court’s desire to give the government the widest possible discretion in dealing with communist states prompted the ironic and contradictory result of replacing deference to party autonomy with deference to the Executive. Paul, *supra* note 154 at 32.

<sup>332</sup> However, “[u]nlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits. Under that doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts.” *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004). See also *Samantar v. Yousuf*, 560 U.S. 305, 322 (2010). Most importantly, as Justice Marshall pointed out in a dissent, the two “differ fundamentally in their focus and in their operation. Sovereign immunity accords a defendant exemption from suit by virtue of its status. By contrast, the act of state doctrine exempts no one from the process of the court.” *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 725-26 (1976).

<sup>333</sup> *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972).

not serve the interests of American foreign policy.”<sup>334</sup> By the same token, the application of the rule out of deference would have been illogical if the interested party – the Executive – had counselled otherwise.<sup>335</sup> According to Koh, “by explicitly linking the Act of State Doctrine to separation of powers, *Sabbatino* implied that determinations regarding the legality of foreign state acts are quasi-political questions, whose decision is appropriately confided in the Executive.”<sup>336</sup> Almost two decades later, *Kirkpatrick*<sup>337</sup> offered an opportunity to discuss the shifting foundations of the doctrine. In its opinion, delivered by Justice Scalia,<sup>338</sup> the Court was unambiguous in describing it as “a consequence of domestic separation of powers, reflecting “the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder” the conduct of foreign affairs,” thus confirming the first part of the comment above.<sup>339</sup> And yet, while no question was made expressly of the need to defer to the Executive, a reading of *Kirkpatrick* suggests a narrower interpretation of the Act of State doctrine: it may only be employed when there is one specific act of state, and that the act has bearing on the outcome of the dispute is less obvious a remark than might appear at first glance.<sup>340</sup> In other words, the underlying policies giving rise to the doctrine cannot, by themselves, give rise to the application of the doctrine lacking an act of the foreign government the validity of which is at issue: The “embarrassment” of any government is either devoid of any relevance, or in any event fails, in and by itself, to constitute a sufficient reason for a court to decline its jurisdiction.<sup>341</sup>

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<sup>334</sup> *Id.* at 767.

<sup>335</sup> *Id.* at 769-70.

<sup>336</sup> Harold Koh, *Transnational public law litigation*, YALE LAW J. 2347-2402, 2362 (1991).

<sup>337</sup> *Kirkpatrick & Co. v. Evtl. Tectonics*, 493 U.S. 400 (1990).

<sup>338</sup> Interestingly, Scalia was a vocal supporter of separation of powers doctrines. See Koh, *supra* note 338 at 2366.

<sup>339</sup> *Kirkpatrick*, 493 U.S. at 404.

<sup>340</sup> *Id.* at 406.

<sup>341</sup> *Id.* at 410.

For our purposes, the way the doctrine operates need not be clarified further: But what is, then, the function of comity in this context? In a recent study, William Dodge has argued that the Act of State doctrine should not be classified as a form of “executive comity,” but must on the contrary be understood as constituting a principle of recognition, a *species* of prescriptive comity. The remark is not devoid of merit, but tends to describe the result of the doctrine rather than its basis, and happens to be no news at all. As the Court noted in *Sabbatino*, “[t]he act of state doctrine... although it shares with the immunity doctrine a respect for sovereign states, concerns the limits for determining the validity of an otherwise applicable rule of law.”<sup>342</sup> In other words, while the end product of the rule is the recognition of a foreign act, the fact that this recognition may extend to manifestly unlawful actions does render the element of respect for foreign states and relations preponderant.<sup>343</sup> Further, as the Court put it in *First National City Bank*, “the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches.”<sup>344</sup> True, *Kirkpatrick* has, at the very least, mitigated the significance of comity for the use of the doctrine – and indeed, as far as its application is concerned, Joel Paul is absolutely correct in observing that “[t]he risk of embarrassing the executive is a curious rationale for a conflicts principle.”<sup>345</sup> The point is that, if “embarrassment” belongs within the semantic spectrum of comity, the contrary is not necessarily true. In fact, the comity that explains the origin of the act of state doctrine – it was through comity that American courts created the doctrine in their quest to “accommodate

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<sup>342</sup> *Sabbatino*, 376 U.S. at 411.

<sup>343</sup> See also *Sabbatino*, 376 U.S. at 458-9 (White, J., dissenting) (“Where a clear violation of international law is not demonstrated, I would agree that principles of comity underlying the act of state doctrine warrant recognition and enforcement of the foreign act.”).

<sup>344</sup> *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765.

<sup>345</sup> Paul, *supra* note 154 at 32.

respect for foreign sovereignty with growing American intercourse with other nations”<sup>346</sup> — is very much the same comity that remains relevant for the modern-day life of the institution. In other words, comity, intended as a tool to promote successful political and commercial relations, supports the idea of deference to the Executive, assumed as the branch capable of best pursuing these objectives.

## 2. *Sovereign immunity*

Doctrines of sovereign immunity have long been recognized to be founded on comity. True, the early landmark case *The Schooner Exchange v. McFaddon*, often labelled as “[t]he classic case illustrating the relationship between territorial jurisdiction and sovereign immunity,”<sup>347</sup> does refer to comity as such.<sup>348</sup> While affirming that [t]he jurisdiction of the nation within its own territory” was “necessarily exclusive and absolute” and “susceptible of no limitation not imposed by itself,” Chief Justice Marshall observed that exceptions did exist, though they ultimately had to be traced to the consent of the nation, “either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction, but if understood, not less obligatory.”<sup>349</sup> Marshall’s skillful and balanced language in putting forward an exception to sovereignty while reaffirming its absoluteness,<sup>350</sup> along with his oblique reference to the language of the law of nations,<sup>351</sup> have somehow diminished the significance of comity elements in the case.<sup>352</sup> And yet, these elements were clearly there:

the world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other and by an

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<sup>346</sup> Koh, *supra* note 338 at 2257.

<sup>347</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW* 699 (6th edition ed. 2008).

<sup>348</sup> 11 U.S. 116 (1812).

<sup>349</sup> *Id.* at 136.

<sup>350</sup> PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956).

<sup>351</sup> Compare the similar language in See also *supra*, note 63, for a comparison with similar Grotian expressions.

<sup>352</sup> Hazel Fox, *International Law and Restraints on the Exercise of Jurisdiction by National Courts of States*, in *INTERNATIONAL LAW*, 359–60 (Malcolm Evans ed., 2010).

interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.<sup>353</sup>

A number of authorities, American and foreign, support the proposition that the *The Exchange* was founded on comity. In the English case *The Parlement Belge*, for example, the Court of Appeal cited the American decision to support the proposition that as “a consequence of the absolute independence of every sovereign authority and of the international comity” sovereign states should decline to exercise territorial jurisdiction.<sup>354</sup> When a similar case reached the House of Lords in 1938, Lord Maugham relied on *The Exchange* to state that “the word ‘comity,’ whatever may be its defects in regard to other rules of private international law, has a very powerful significance” in the context of immunity.<sup>355</sup>

Again, the relation between comity and immunity was addressed in *Guaranty Trust Co. v. United States*, where it was held “that upon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent.”<sup>356</sup> The relation was further addressed in Justice Reed’s dissent in *City Bank of New York v. Republic of China*,<sup>357</sup> where he asserted that any consent to a relaxation of jurisdictional rules could, “in some instances, be tested by common usage, and by common opinion, growing out of that usage.”<sup>358</sup> To Reed, the word “comity” represented as good a shorthand as any to describe the whole phenomenon; further, it called to mind the idea that the sovereign could easily revoke

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<sup>353</sup> *The Schooner Exchange*, 11 U.S. 116, 137.

<sup>354</sup> (1880) 5 P.D. 197.

<sup>355</sup> *Compania Naviera Vascongado v Steamship “Cristina”* [1938] A.C. 485. The case is remembered as most divisive: see SHAW, *supra* note 349 at 705.

<sup>356</sup> 304 U.S. 126, 134-35 (1938).

<sup>357</sup> 348 U.S. 356 (1955).

<sup>358</sup> *Id.* at 367.

any such consent.<sup>359</sup> Indeed, there exist examples in which the severance of diplomatic relations was considered sufficient grounds to deny the invocation of immunity by a foreign government.<sup>360</sup> However, it was in *Verlinden B.V. v. Central Bank of Nigeria*<sup>361</sup> that a definitive interpretive statement clarifying the basis of immunity: “As *The Schooner Exchange* made clear... foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.”<sup>362</sup> For the Court, this circumstance justified the consistent deference to the political branches in determining whether it was appropriate to exercise jurisdiction against foreign sovereigns and their instrumentalities.<sup>363</sup> The point was further expanded upon in *Dole Food Co. v. Patrickson*,<sup>364</sup> where the court held that the purpose of foreign sovereign immunity was to give “states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns.”<sup>365</sup> Interestingly, comity was invoked in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*<sup>366</sup> to rule that duly established government instrumentalities were presumed to have independent status. Citing *Hilton v. Guyot*, the

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<sup>359</sup> *Id.* Similar conclusions on the meaning of *The Exchange* had been reached in *La Santissima Trinidad*, where it was held that “[e]xemption] was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction. But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels.” 20 U.S. 283, 352-3 (1822).

<sup>360</sup> *The Gul Djemal*, 296 F. 563, *Id.*, 296, cited in *Sabbatino*. The case was affirmed on different grounds.

<sup>361</sup> 461 U.S. 480 (1983).

<sup>362</sup> *Id.* at 486. See also, seemingly suggesting that *The Exchange* had generally been interpreted too broadly, *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). See also *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014) (“Foreign sovereign immunity is, and always has been, “a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.”).

<sup>363</sup> *Verlinden B.V.* 461 U.S. 480, at 486 (1983).

<sup>364</sup> 538 U.S. 468 (2003).

<sup>365</sup> *Id.* at 479.

<sup>366</sup> 462 U.S. 611 (1983).

decision affirmed as much based on “[d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations.”<sup>367</sup>

More recent cases seem to rely on comity to a lesser extent, but its importance still seem to be significant. In *Republic of Austria v. Altmann*,<sup>368</sup> a case dealing with an action under the FSIA, the court referenced comity and discussed its role in shaping the doctrine of immunity at length, but the concept does not appear to have played a major role in the solution of the case.<sup>369</sup> *Republic of Philippines v. Pimentel*,<sup>370</sup> though, paints a different picture: The case concerned a litigation in which the Republic of the Philippines and the Philippine Presidential Commission on Good Governance had invoked immunity, but the lower courts had allowed the litigation to proceed with regards with the other parties. In delivering the opinion of the Court, Justice Kennedy criticized the approach and held that

[t]he District Court and the Court of Appeals failed to give full effect to sovereign immunity when they held the action could proceed without the Republic and the Commission. Giving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine.<sup>371</sup>

The conclusion is particularly interesting, because it resulted in a different interpretation of Rule 19 of the Federal Rules of Civil Procedure. This interpretation was in turn mandated by comity, the operation of which required a broader conception of immunity.<sup>372</sup>

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<sup>367</sup> *Id.* at 626.

<sup>368</sup> 541 U.S. 677 (2004).

<sup>369</sup> *Id.* 694-5.

<sup>370</sup> 553 U.S. 851 (2008).

<sup>371</sup> *Id.*

<sup>372</sup> *Id.* section IV.



### 3. *The privilege of suit*

Finally, comity has traditionally served as the traditional justification for the privilege granted to foreign governments to bring suit in United States Courts. As early as 1870, Justice Bradley affirmed as much in delivering the opinion for an unanimous Court in *The Sapphire*<sup>373</sup>:

The first question raised is as to the right of the French Emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling... The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and foreign States, citizens, or subjects, without reference to the subject-matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war.<sup>374</sup>

The decision relied heavily of comity, more so than the precedent that the Court cited, where the basis for allowing a sovereign's suit was grounded solely in the Constitution.<sup>375</sup> One consequence of this approach to granting of the privilege, of course, was the ability to preserve "the discretion of the United States to deny it, at least to foreign states that are at war with the United States or not recognized by it."<sup>376</sup> While this conclusion is not clear from the wording of the decision, this is certainly the conclusion that was reached in later cases.<sup>377</sup> But the privilege of suit, in this regard, differs fundamentally from immunity. As the Court put it in a

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<sup>373</sup> 78 U.S. 164 (1870).

<sup>374</sup> *Id.* at 167-8.

<sup>375</sup> The decision refers to an earlier decision by the Pennsylvania Circuit, where it was affirmed that "the constitution (*sic*) of the United States gives jurisdiction to the courts of the United States, in cases where foreign states are parties; and the judicial act gives jurisdiction to the circuit courts, in all cases between aliens and citizens." *King of Spain v. Oliver*, 14 F. Cas. 577, 579 (C.C.D. Pa. 1810).

<sup>376</sup> Dodge, *supra* note 4 at 2091 citing the authority of *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308.).

<sup>377</sup> "Although comity is often associated with the existence of friendly relations between states... prior to some recent lower court cases which have questioned the right of instrumentalities of the Cuban Government to sue in our courts, the privilege of suit has been denied only to governments at war with the United States." *Sabbatino*, 376 U.S. at 409.

later case, “[b]y voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought.”<sup>378</sup> Interestingly, the issue of privilege of suit was later raised in a case which dealt with a question of statutory interpretation. In *Pzifer* the Court clarified whether a sovereign state damaged by anticompetitive conduct could sue for treble damages in United States district courts.<sup>379</sup> The question ultimately came down to whether sovereign states qualified as persons under the Clayton Act,<sup>380</sup> which the Court answered in the affirmative, responding to a vigorous dissent of the Chief Justice by invoking the hoary rule of the privilege of suit and its basis in comity.<sup>381</sup>

It has been argued that comity, the roots of the privilege notwithstanding, has now a much smaller role to play, and that questions concerning suits brought by foreign governments can be resolved by clear-cut – if judge-made – rules, as opposed to standards.<sup>382</sup> But as a less dated Second Circuit decision puts it, reliance on comity highlights “that foreign nations are external to the constitutional compact, and it preserves the flexibility and discretion of the political branches in conducting this country's relations with other nations.”<sup>383</sup> The Act of State doctrine, sovereign immunity and the privilege of foreign governments to bring suit in United States courts all have their basis in comity. But is the role of comity still significant? While other elements may play a role, what lies beneath the surface reveals a more complex reality.

First of all, it must be observed that the comity basis of these doctrines also provides a convincing explanation to the problem of deference to the political branches of the government: Indeed, such deference is intended to increase the odds of successful conduct of

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<sup>378</sup> *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134-35 (1938).

<sup>379</sup> 434 U.S. 308, 311-312.

<sup>380</sup> 15 U.S.C. § 12.

<sup>381</sup> *Id.* at 318-19.

<sup>382</sup> Dodge, *supra* note 4 at 2126.

<sup>383</sup> *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002).

foreign relations, especially where sensible matters were implicated, and thus mutual convenience. It is worth recalling that comity – much like smooth talk – was never there for its own sake. Whether the doctrines “reflect not a concern about entanglement” or “a rough consequentialist judgment on the part of the federal courts”<sup>384</sup> really does not make that much of a difference. Be that as it may, the idea of deference to the Executive and the separation of powers rationale always reflected<sup>385</sup> and still reflects serious policy concerns, also echoed in how the doctrine developed off of American soil.<sup>386</sup>

Be that as it may, it appears that American courts have less discretion at their disposal. *Kirkpatrick* has significantly restricted the operation of the Act of State doctrine; a comprehensive set of rules governs immunities after “Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime.”<sup>387</sup> It is precisely with this in mind that Harold Koh writes about “a decline in the deference shown by U.S. courts to foreign sovereignty.”<sup>388</sup> Let us consider again the examples made above: It is clear that *Kirkpatrick* limits the operation of the Act of State doctrine, but it is not quite evident from the decision that, necessity of a tangible act of state aside, no instance of foreign embarrassment should be covered by the doctrine.<sup>389</sup> Much in the same way, the FSIA has been found not to be as all-encompassing as some may have thought, thus leaving

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<sup>384</sup> Posner and Sunstein, *supra* note 186 at 1226.

<sup>385</sup> See the Executive’s intervention in *The Exchange* 11 U.S. 116, 117-8.

<sup>386</sup> *Buttes Gas and Oil Co. v. Hammer* [1982] AC 888. See generally Michael Singer, *The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice*, 75 AM. J. INT. LAW 283-323 (1981); CRAWFORD, *supra* note 31 at 85.

<sup>387</sup> *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 189 L. Ed. 2d 234 (2014).

<sup>388</sup> KOH, *supra* note 29 at 88.

<sup>389</sup> *Id.* at 101. See also *Kirkpatrick*, 493 U.S. at 408 (“The function of the Act of State doctrine is to promote “international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations.”); *Hourani v. Mirtchev*, 796 F.3d 1 (D.C. Cir. 2015).

open the possibility of common law foreign sovereign immunity effectively barring a suit.<sup>390</sup> To some extent, this description matches Dodge's suggestive picture of "an international law 'core' and a comity 'penumbra,'" though it is certainly true — as Dodge concedes — that many phenomena are regulated by comity alone.<sup>391</sup>

The better view appears to be that comity, though relegated to an ancillary role, remains a widely invoked and discussed concept in the case law of American courts dealing with the three doctrines discussed above and maintains its value as an interpretive principle.

## V. UNITED STATES EXPERIENCE AND THE GLOBAL DIMENSION OF COMITY

In the foregoing sections we have examined the approach American courts and scholars have adopted when dealing with the concept of comity. It is now time to understand its peculiarities and overall fortune in the global discourse on the notion.

### A. Comity doctrines and comity reasoning

An analysis of the notion of comity in American law does not simply highlight the variety of meanings that are commonly associated with the expression; rather, the most striking finding is perhaps the sheer number of doctrines and rules which in comity find their rationale. Through an examination of references to comity, we have found that the notion is taken into account in a variety of settings, such as the limitation of the reach of foreign law, the management of competing proceedings, the grant of foreign immunity or of the privilege to suit to foreign states or persons acting in official capacity. It is difficult to drive out the impression that, today

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<sup>390</sup> *Samantar v. Yousuf*, 560 U.S. 305, 322 (2010). In the case at issue the Court was careful in "emphasiz[ing] ... the narrowness of [its] holding" entrusting the question of "[w]hether petitioner may be entitled to immunity under the common law" to the District Court on remand. *Id.*

<sup>391</sup> Dodge, *supra* note 4 at 2084.

as in Huber's time, comity has been to judges "a springboard from which they proceeded to develop a highly organized and sophisticated set of choice of law rules."<sup>392</sup>

True, as Donald Childress has convincingly observed, American courts have largely lost touch with the conflict of laws roots (and rationale) of the comity doctrine, which would provide "a more principled basis for applying the doctrine in transnational cases by bringing sovereign interests to light" and allowing for a more reasoned mediation between them.<sup>393</sup> And yet, other factors must be taken into account. First, reliance on a "conflict of laws" rationale might be useful and appropriate for the resolution of certain types of clashes between sovereign interests, but one wonders if the development of international law might have left any space for this approach in questions such as, for example, immunity. Secondly, the possibility should be entertained that courts have quite different things in mind when they think about such clashes, and possibly not the greatest clarity on the matter – the antitrust cases discussed above serve as a striking example. But what is, then, the significance of comity in the resolution of modern cross-border disputes? How is it possible to reconcile its nature and origins with modern decision-making?

While fundamentally accurate and evocative of the original roots of the doctrine, the metaphor of "comity as a springboard" does not fully describe its role in American law. We need not enter discussions on whether its demands are met by the application of rules or standards – indeed, while the distinction is undoubtedly relevant, it is of no consequence for our purposes.<sup>394</sup> What we submit is that comity often enters the picture in a more oblique manner than it is generally suggested, and that what we may label "comity reasoning" is as important as the reliance on the "principle" or "the doctrine" of comity.

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<sup>392</sup> See *supra* note 60 and accompanying text.

<sup>393</sup> Childress, *supra* note 4 at 63.

<sup>394</sup> Dodge, *supra* note 4 at 2124.

One illustration is offered by the numerous references to comity in the context of decisions involving international law. To a number of commentators, American courts have consistently struggled to distinguish one from the other. There is certainly truth to this claim, but the American judiciary might have received disproportionately bad press. In fact, in many cases, it appears that courts have simply used the concept of comity as lens through which they were required to ascertain what exactly international law permitted or required.<sup>395</sup> As Jörn Kämmerer observed, the idea that the interpretation of norms of international law may draw inspiration from comity is not theoretically illogical, especially if comity's theoretical vicinity with the principle of good faith is taken into account.<sup>396</sup> When these aspects are considered, the cogency of comity appears in another light: Statements to the effect that "the king is wise and good"<sup>397</sup> clearly work much better in the context of domestic statutory interpretation than they do with regards of international sources. In other words, there might be method in the American judiciary's apparent confusion of comity and public international law, in that the former allows American courts to give proper effect to the latter.

## B. The problem of deference to the executive

The debate on comity in the United States has often turned into a discussion on separation of powers. It should be clear by now that comity – as a doctrine, as a theoretical construct – is largely agent-agnostic in terms of which among the powers exercises it. Not only does this observation find solid grounding in Huber's own statement of the doctrine, where it was simply stated that the *rectores imperorum* – the sovereigns – were to act *comiter*, "according the

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<sup>395</sup> See *supra* note 145 and accompanying text.

<sup>396</sup> Jörn Kämmerer, COMITY MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2006), <http://opil.ouplaw.com/home/epil>.

<sup>397</sup> EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 29–30 (1989).

rights acquired within the limits of a government retain their force everywhere.”<sup>398</sup> Indeed, it also accords with the rationale of many canons of statutory interpretation, first and foremost the presumption against extraterritoriality, which assumes comity to have been exercised by the legislative branch, the role of the judiciary being limited to an *ex post* recognition of such exercise. Yet, by looking at the instances in which comity has been invoked and the issue of deference to the Executive raised, one would not conclude that the problem of separation of powers fits so neatly in the life of the doctrine. In fact, it is arguable that the most troubling links between comity and deference to the executive stem from sensitive matters arising from cross-border or international disputes.

This conclusion seems obvious, but it need not be: indeed, comparable occurrences before courts of other nations have not prompted courts to grant the political branches such a substantial degree of deference.<sup>399</sup> More precisely, a more limited number of hypotheses call for this type of deference, which is, conversely, deeply rooted in American legal thinking and continues to encourage one of the most unbending “myths” of international comity.<sup>400</sup> Indeed, this difficulty has less to do with questions relating to the United States form of government than with certain attitudes of the American judiciary, divided – when dealing with issues of foreign affairs – between the opposed approaches of a “customary” practice of judicial abdication<sup>401</sup> and their constitutional “province and duty... to say what the law is.”<sup>402</sup> Further, contrary to obsequiousness to the will of Congress, deference to the Executive could also be

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<sup>398</sup> Lorenzen, *supra* note 57 at 227. See also *Hartford Fire*, 509 U.S. 764, 813 (1993) (Scalia, J.).

<sup>399</sup> For example, in the United Kingdom the question of deference to executive power normally arises in the context of political questions and issues of justiciability. For an example concerning the grant of diplomatic protection and the position of the British Court of Appeal that an unreasonable refusal would have been considered justiciable, see *R. (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2003] U.K.H.R.R. 76, paras. 51, 85, 106 (C.A.). See also Supreme Court of Canada, *Khadr (No 2)* 2010 SCC 3, [2010] 1 SCR 44.

<sup>400</sup> Dodge, *supra* note 4 at 2132.

<sup>401</sup> *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 338.

<sup>402</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). See Curtis A. Bradley, *Chevron deference and foreign affairs*, VA. LAW REV. 649–726 (2000).

seen as undermining the principle of democratic accountability, and the advocacy of Executive power in this area is linked to the growing fear of the “Soviet threat.”<sup>403</sup> As Curtis Bradley has persuasively observed, the main problem with the hoary problem of deference is that it has been traditionally perceived as a unitary phenomenon, when in fact it cannot be labelled as such.<sup>404</sup>

While there appears to be no reason why a court cannot be invested of an issue having cross-border significance and conduct its comity analysis, where needed, alone, it goes without saying that common sense and institutional courtesy limit this kind of behavior, and the argument that at least some deference should be given to the Executive appears quite compelling: But how to explain and conceptualize a framework for deference?

It has been suggested that borrowing the doctrine of *Chevron*<sup>405</sup> deference from administrative law could be particularly fruitful.<sup>406</sup> Broadly speaking, the *Chevron* doctrine requires courts to engage in a two-step analysis in the interpretation of statutes, first determining whether Congress has spoken clearly on the question at issue, and then giving deference to the reading put forward by the governmental agency tasked with administration of the statute itself, insofar as it is permissible.<sup>407</sup> The rationale for this deference is that “[j]udges are not experts in the field, and are not part of either political branch of the Government,” while agencies are both better placed and more politically accountable – if only through the Chief Executive.<sup>408</sup>

With comity in mind, reliance on the *Chevron* rationale can be either hailed as a helpful contribution or criticized as an unnecessary and problematic complication: The truth probably

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<sup>403</sup> Paul, *supra* note 154 at 33.

<sup>404</sup> Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. LAW REV. 649, 659 (2000).

<sup>405</sup> *Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>406</sup> Bradley, *supra* note 406; Posner and Sunstein, *supra* note 186.

<sup>407</sup> *Chevron*, 467 U.S. at 842-43, 865.

<sup>408</sup> *Id.* at 865-66.



stands somewhere in between and, most importantly, is highly context-dependent. Indeed, the Executive's interpretation of a treaty is not the same thing as relying on its determination as to whether the Act of State doctrine should not be applied, or a foreign head of state granted immunity from jurisdiction.<sup>409</sup> The concept of deference is clearly not unitary.<sup>410</sup> And as far as comity is concerned, William Dodge has persuasively argued that deference to the executive is highly inappropriate wherever the doctrine comes down to "the core responsibility of the courts to manage their dockets and decide cases."<sup>411</sup> We understand Dodge's argument as mostly based on the *domestic* dimension of separation of powers; we restrict ourselves to appending a minor observation on the *international* dimension of the phenomenon, noting that deference to the executive in circumstances such as, for example, the recognition of foreign judgments and acts, the whole area of adjudicatory comity, could – in itself – be perceived by foreign sovereigns as revealing of a want of comity.

Beyond this aspect, the involvement of the executive need not, in and by itself, be considered incompatible with the doctrine of comity on the international plane, though the extent to which it is defensible is a matter of degrees and balance. To bring this further, we may consider the role of deference within the broader framework of "foreign relations law," a legal category that sounds rather unfamiliar to those writing from other shores of the Atlantic, but a well-established one in the United States.<sup>412</sup> As McLachlan, of one of the few non-American lawyers who has devoted considerable attention to the field, put it, foreign relations law performs an "allocative function."<sup>413</sup> As the author contends, this function is an aggregate of two different ones, in that it controls the jurisdiction and applicable law "in the external

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<sup>409</sup> *Samantar v. Yousuf*, 560 U.S. 305, at 322 (2010).

<sup>410</sup> Bradley, *supra* note 406 at 666.

<sup>411</sup> Dodge, *supra* note 4 at 2132.

<sup>412</sup> See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2 edition ed. 1997).

<sup>413</sup> Campbell McLachlan, *The Allocative Function of Foreign Relations Law*, 82 BR. YEARB. INT. LAW 349–380, 377 (2012).

exercise and control of the public power of states” and contributes to the ordering of “the allocation of foreign affairs competence within the municipal constitution.”<sup>414</sup> This allocative function obeys a conflict of laws logic: However, while conflict involves determinations on jurisdiction and applicable law that follow a “two-dimensional” approach considering two systems of municipal law, foreign relations law implicates a “three-dimensional” judgment on the allocation of institutional competence.<sup>415</sup> In the United States, foreign relations law is a fundamentally internal matter and reflects the American Constitution’s structural aspects. It follows that constitutional prerogatives of the Executives make it so that deference is, if not always necessary, justifiable. To this extent, whether this is compatible with the Courts’ “judicial duty to know and to declare” the “comity of our own country” is probably a question.<sup>416</sup>

On the one hand, the Executive may appeal because of its expertise and accountability<sup>417</sup>; on the other hand, there may be questions of legitimacy and fear of being led onto a short-term focused agenda with potentially harmful long-term consequences.<sup>418</sup> But above all, Dodge rightly observes that “[e]ach opportunity for deference invites pressure from foreign governments and creates the possibility of diplomatic backlash if the Executive decides not to support their positions.”<sup>419</sup> In this regard, the pattern established in limiting the reliance on executive determinations in the areas of foreign sovereign immunity supports the proposition

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<sup>414</sup> *Id.* at 377.

<sup>415</sup> *Id.* at 380. Quite remarkably, McLachlan refers to Lauterpacht’s own treatment of issues of foreign relations law in *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 397 (2011). As Martti Koskenniemi discusses in the foreword to the revised edition, Lauterpacht was wary of areas of non-justiciability, more so on the international plane. However, to the question of whether the “limitation of the competence of the courts in these matters [could] be construed as a limitation of the rule of law within the State.” As he continued, “care must be taken not to confuse the limitation upon the unrestricted freedom of judicial decision with a limitation of the rule of law.”

<sup>416</sup> *Hilton v. Guyot*, 159 U.S. 113, 228.

<sup>417</sup> *KOH*, *supra* note 29 at 150.

<sup>418</sup> Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 *YALE LAW J.* 1230, 1262 (2007).

<sup>419</sup> Dodge, *supra* note 4 at 2140.

that the “government need not, and should not, speak in every case.”<sup>420</sup> As then Legal Adviser to the Department of State Harold Koh’ put it, “[i]n domestic litigation, [the Department’s] ultimate goal is, in fact, not more verbiage, but more silence.”<sup>421</sup>

C. Beyond the domestic: the “comity of courts” as a global ordering principle

In 1998, in the wake of *Breard v. Greene*<sup>422</sup> and the provisional measures issued by the International Court of Justice (ICJ) in the *Case concerning the Vienna Convention on Consular Relations*,<sup>423</sup> Anne-Marie Slaughter penned a seminal essay on the *American Journal of International Law* in which she discussed the implications of the Supreme Court’s decision not to accord a stay of execution in compliance with the World Court’s order.<sup>424</sup> Slaughter observed that, irrespective of whether the measures issued by the ICJ were binding,<sup>425</sup> the Supreme Court should have nonetheless honored the request “as a matter of judicial comity.”<sup>426</sup> In this essay and her subsequent work, Slaughter observed that the United States judiciary was re-discovering the concept of “judicial comity,” building the case on the basis of Scalia’s dissent in *Hartford Fire*. It has been long argued that “the comity of courts” terminology left much to be desired, but it most certainly provide an opportunity for Slaughter to describe a number of approaches and attitudes as driven by comity, and comity as “the lubricant of

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<sup>420</sup> Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 VAND. J. TRANSNAT’L L. 1141 (2011), 1161.

<sup>421</sup> Id.

<sup>422</sup> 523 U.S. 371 (1998)

<sup>423</sup> *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, ICJ Reports 1998, p. 248.

<sup>424</sup> Anne-Marie Slaughter, *Court to Court*, (1998), 92 AJIL 708-at.

<sup>425</sup> There can now be very little doubt as to the binding nature of the provisional measures issued by international courts and tribunals. There exists a large amount of literature on the topic. See, e.g., CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (2007); SHABTAI ROSENNE, PROVISIONAL MEASURES IN INTERNATIONAL LAW: THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (1 edition ed. 2005); Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989 Part Eleven*, 71 BR. YEARB. INT. LAW 71–180 (2001).

<sup>426</sup> Slaughter, *supra* note 426 at 708.

transjudicial relations.”<sup>427</sup> Slaughter’s understanding of “judicial comity” later evolved as one of the building blocks of the theoretical model she developed in later writings for the construction of a global legal system through the concerted work of domestic courts. In *A New World Order* she described it as providing

... the framework and the ground rules for a global dialogue among judges in the context of specific cases. It has four distinct strands. First is a respect for foreign courts qua courts, rather than simply as the face of a foreign government, and hence for their ability to resolve disputes and interpret and apply the law honestly and competently. Second is the related recognition that courts in different nations are entitled to their fair share of disputes—both as co-equals in the global task of judging and as the instruments of a strong “local interest in having localized controversies decided at home.” Third is a distinctive emphasis on individual rights and the judicial role in protecting them. Fourth, although seemingly paradoxically, is a greater willingness to clash with other courts when necessary, as an inherent part of engaging as equals in a common enterprise.<sup>428</sup>

To be sure, Slaughter’s claims have sometimes been portrayed as vaguely starry-eyed: Most notably, while acknowledging that conflict between courts is inevitable, she argues that it is conducive to greater dialogue, and thus comity.<sup>429</sup> As Alex Mills and Tim Stephens have observed, such a claim relies on the notion that “the ‘special’ character of courts” and “a capacity of a free market of legal ideas to avoid distortions caused by inequalities of power” will allow substantive conflict avoidance through agreed procedure.<sup>430</sup> Yet, Slaughter’s theory has proved fascinating to many, especially to those scholars and practitioners who dealt with the

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<sup>427</sup> *Id.* at 708.

<sup>428</sup> SLAUGHTER, *supra* note 17 at 87; Many of these aspects had been dealt with in Slaughter, *supra* note 250; Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT. LAW J. 191 (2003).

<sup>429</sup> SLAUGHTER, *supra* note 17 at 89–90.

<sup>430</sup> Alex Mills & Tim Stephens, *Challenging the Role of Judges in Slaughter’s Liberal Theory of International Law*, 18 LEIDEN J. INT. LAW 1–30, 30 (2005).

most informal of all legal regimes, that of public international law. In the context of fragmentation of international law and its “institutional side,”<sup>431</sup> the proliferation of international courts and tribunals, it has been often argued that comity might have the potential of mitigating the resulting problems.<sup>432</sup> The practice of international adjudication and arbitration too seems to provide a number of indications that international courts and tribunals are conscious of the value of comity, and respect each other’s competence and decision-making capacity, displaying an awareness of their status as “co-equals in the global task of judging” and recognizing different specializations.<sup>433</sup> This attitude seems to transcend simple institutional dialogue,<sup>434</sup> rather amounting to “an emerging general principle of international procedural law.”<sup>435</sup> Indeed, there are indications that comity has served as a valuable tool even when dealing with competing proceedings before courts of different orders.<sup>436</sup>

Reasons of space and context prevent us from examining these aspects in further detail. We restrict ourselves to observing that the roots of the global comity discourse are, in both its real-world and theoretical dimensions, unmistakably American.<sup>437</sup>

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<sup>431</sup> CRAWFORD, *supra* note 171 at 199–200.

<sup>432</sup> See, e.g., *Id.* at 210–11.; Schultz and Ridi, *supra* note 6; SHANY, *supra* note 18 at 260; YUVAL SHANY, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS 166 and *passim* (2007).

<sup>433</sup> See for example *Ireland v. United Kingdom* (“MOX Plant Case”) (Order No 3) (UNCLOS Annex VII Tribunal, PCA), where the tribunal relied on “considerations of mutual respect and comity which should prevail between judicial institutions” to justify the suspension of its proceedings in the face of an almost certain involvement of Court of Justice of the European Union. A compelling critique of this decision can be found in MCLACHLAN, *supra* note 62 at 455. For a discussion of the meaning and significance of comity in a variety of different international fora, see Schultz and Ridi, *supra* note 6.

<sup>434</sup> See for example Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INT. COMP. LAW Q. 791–804 (2006); Cesare PR Romano, *Deciphering the Grammar of the international jurisprudential dialogue*, 41 NYU J. INTERNATIONAL LAW POLIT. 755 (2008); Relying almost exclusively on the concept of comity Elisa D’Alterio, *From judicial comity to legal comity: A judicial solution to global disorder?*, 9 INT. J. CONST. LAW 394–424 (2011).

<sup>435</sup> Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT. LAW 265–297, 287 (2009).

<sup>436</sup> See, e.g., ICSID, *Société Générale de Surveillance S.A. v. Republic of the Philippines* – Decision on Objections to Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/6. See also, generally, SHANY, *supra* note 434; Schultz and Ridi, *supra* note 6.

<sup>437</sup> See for example *Bank of Augusta v. Earle*, where Justice Taney saw comity as promoting a friendly intercourse between the sovereignties.” 38 U.S. (13 Pet.) 519.

## VI. CONCLUSION

Centuries after Westphalia, sovereignty and territoriality still hold their significance as fundamental notions in the global ordering of regulatory authority. Despite proclamations of their absolute value, they remain — as they have always been — relative notions. Their evolution, informed by change and tensions, has, time after time, resulted in troubled waters where the safest course has often been inspired by the comity doctrine. Indeed, the development of the doctrine in the United States has shadowed these changes, rendering comity a lens through which a world of competing sovereignties could be better understood, and a source of techniques to be employed with the results of such a theoretical analysis. Comity has gone on to become deeply embedded in the American legal mindset and vocabulary, but it has also transformed, adapting to the needs of a different type of sovereignty — that of a super power, unafraid of most things, never mind an extraterritorial assertion of jurisdiction. But if the force of comity has faded as a jurisdictional constraint, that is, on the international plane, its significance at the domestic level has remained substantial. In that respect, comity has gone beyond its nature of conflict of laws principle and has become a fully-fledged tenet of foreign relations law, conveying constitutional concerns of separation of powers and contributing, in addition to its external dimension, to the domestic element of the “allocative function” of this area of the law.

To be sure, the concept remains elusive and difficult to define unambiguously. But, if “the definition of comity may be tenebrous, its importance could not be more clear.”<sup>438</sup> This article has sought to show how American courts have invoked the concept for a variety of purposes, some fitting the original theoretical foundations of the doctrine, and some others going

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<sup>438</sup> *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 19 (1st Cir. 2004).

beyond; we have tried to highlight the most representative examples of comity-based reasoning to illustrate how entrenched the doctrine is in the way American judges and scholars think; we have elected to partially distance ourselves from the perspective of private international law to frame the discourse on comity in the broader framework of foreign relations law, endeavoring – to our mind, successfully – to make sense of the peculiarity of the American experience; finally, we have discussed how the American experience on comity has proved influential and helped construe the doctrine as a theoretical construct capable of mitigating conflict between regimes fundamentally different from interstate ones, such as the ones between the jurisdictions of international courts and tribunals.

When all is said and done, it is perhaps true that comity plays a smaller role today than it did two hundred years back. Critics of the doctrine have always conceded that it was never really forgotten by the American legal world and in this study we acknowledge as much, but we also demonstrate how its use is as lively as ever. True, comity has undoubtedly “transformed.”<sup>439</sup> This transformation, though, is not an indication of the doctrine’s demise: In fact, it confirms its relevance, in light of the incapacity of its corollaries, sovereignty and territoriality, to deal with the challenges of the 21st Century – an incapacity that affected the discourse far beyond legal scholarship.<sup>440</sup> Comity, in other words, still represents an unparalleled “springboard” from which a number of inferences relating to regime conflict can be drawn.<sup>441</sup>

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<sup>439</sup> We borrow the expression from Paul, *supra* note 154.

<sup>440</sup> Boris Johnson is wrong: in the 21st century, sovereignty is always relative, THE ECONOMIST, 2016, <http://www.economist.com/blogs/bagehot/2016/02/bojo-breaks-ranks> (last visited Mar 20, 2016).

<sup>441</sup> MCLACHLAN, *supra* note 62 at 223.